

Allowing Victims' Families to View Executions: The Eighth Amendment and Society's Justifications for Punishment

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The death penalty is, and always has been, a contentious issue in our nation's criminal law, combining deep ideological debate over the proper role of punishment with increasing concerns about victims' rights. With the advent of right to view statutes, which allow victims' families to view the execution of convicted criminals, there are new, emerging concerns about the way in which the death penalty is applied. This Note argues that right to view statutes authorize an unconstitutional act of punishment, considered in light of traditional methods of Eighth Amendment analysis. Ultimately, the author argues, right to view statutes conflict with society's justifications for punishment, and thus should be abolished.

I. INTRODUCTION

"I'll watch you die, boy."¹

This threat was yelled by Randy Ertman as he departed the sentencing of the man who murdered his daughter. But this was more than just a random threat declared in rage—with states permitting families to view the executions of those who murder their loved ones, these infamous words have become a reality. In fact, a number of states have passed statutes granting the victim's family the right to be present at the execution. This Note will show that "right to view" statutes are actually a form of punishment, and thus are subject to the Eighth Amendment's prohibition on "cruel and unusual" punishments.²

Claims that a punishment is "cruel and unusual" have typically arisen in three distinct contexts: (1) the death penalty, (2) prison sentences, and (3) prison administration. While the United States Supreme Court's approach to interpreting "cruel and unusual" in each of these contexts has not always been clear³—and has

¹ Keith D. Nicholson, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103, 1104 n.3 (1995).

² The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

³ "In summary, then, so far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible . . ." *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). Chief Justice Burger noted: "[O]f all our guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms." *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting).

seemingly created three different levels of protection against "cruel and unusual" punishments—a common theme ties all the cases together. The common theme is that punishments are "cruel and unusual" when they conflict with society's justifications for punishment. No matter from which context the case arises, this inquiry has become the basis for deciding whether there is an Eighth Amendment violation; however, the Court defers—to varying extents—to the legislature's answer in the first two contexts, and conducts its own independent inquiry in the prison administration context. But either way, deciding whether a particular punishment conflicts with society's justifications for punishment is an inquiry faithful to the well-established doctrine that the Eighth Amendment not only forbids punishments considered "cruel and unusual" at the time of the Constitution's signing, but also those punishments that do not conform with the "evolving standards of decency that mark the progress of a maturing society"⁴: As society's justifications for punishment change, so does the scope of the Eighth Amendment.

As part of the state's administration of the death penalty, right to view statutes can only be justified, if at all, as a retributive punishment.⁵ But right to view statutes implement a private form of vengeance that has been authorized by the state. They are actually the means legislatures have used to channel the vengeance of those who believe that victims' rights do not go far enough. Whether or not the courts defer to the legislatures or conduct an independent review of this form of punishment, our legal system must not surrender to the cries for blood from those suffering through the grieving process. A private form of vengeance conflicts with the retributive principles traditionally accepted by society. And although efforts to advance victims' rights through satisfying a family's need for so-called closure may serve a legitimate governmental interest, this alone does not constitute a justification for punishment. Therefore, right to view statutes run afoul of the Eighth Amendment's prohibition on "cruel and unusual" punishments.

II. RIGHT TO VIEW STATUTES

States taking action to allow the murder victim's family to view the execution of the prisoner is largely a recent development.⁶ For most of this century, there

⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁵ The punishment imposed by right to view statutes cannot logically—or practically—be justified by general deterrence, the other prevailing justification for the death penalty. *See infra* note 141.

⁶ *See* Michael L. Goodwin, *An Eyeful for an Eye—An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 *BRANDEIS J. FAM. L.* 585, 587–88 (1997) (stating that, in 1984, Louisiana became the first state since public executions were banned to allow families of victims to view executions). In earlier times of our nation, states conducted public executions similar to those conducted in England during the 1700s. *See* LOUIS P.

has been only limited attendance at executions: those people chosen by the prisoner, prison officials, a physician, and, in some states, members of the media and public citizens to serve as witnesses.⁷ As executions become more common in states, there will be a larger forum for states to consider who should attend executions. Existing state laws that do address this issue vary with respect to what they permit: some allow for discretion by prison officials,⁸ others explicitly permit family member presence,⁹ one state's parole board allows family members,¹⁰ and two states only allow viewing through closed-circuit television.¹¹

While the motivation behind enacting right to view statutes will not be found in state legislative history, strong arguments exist that right to view statutes are a result of the victims' rights movement.¹² Both originated in the same time period,

MASUR, RITES OF EXECUTION 25-49 (1989). While family members of victims could have freely attended those executions, in the 1850s states abandoned public executions and moved them behind prison walls. See Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CONST. L.Q. 413, 418-19 (1992); G. Mark Mamantov, *The Executioner's Song: Is There a Right to Listen?*, 69 VA. L. REV. 373, 375-76 (1983) (describing the process whereby states passed statutes to make executions private and arguing that "true" private executions only occurred after the state took control of executions from local sheriffs). Even as late as the 1980s, "family members of murder victims relied mostly on news reports to learn of an inmate's death row appeals. When it came time for the execution, protestors and advocates gathered outside the prison. [Family members], if they came at all, waited outside, too." Louis Romano, *With Death, Hope That Life Goes On*, WASH. POST, Aug. 8, 1996, at A1.

⁷ See Mamantov, *supra* note 6, at 378-80.

⁸ In these states, the warden or another appropriate official is required to have a certain number of citizen witnesses present at the execution. See ARIZ. REV. STAT. ANN. § 13-705 (West 1989); COLO. REV. STAT. ANN. § 16-11-404 (West 1998); FLA. STAT. ANN. § 922.11(2) (West 1996); MISS. CODE ANN. § 99-19-55(2) (1994) (providing explicitly that victim's family may be included at warden's discretion); MO. ANN. STAT. § 546.740 (West 1987); MONT. CODE ANN. § 46-19-103(6) (1997); N.M. STAT. ANN. § 31-14-15 (Michie 1984); S.D. CODIFIED LAWS § 23A-27A-34 (Michie 1998); VA. CODE ANN. § 53.1-234 (Michie 1998).

⁹ See ALA. CODE § 15-18-23 (Supp. 1998); CAL. PENAL CODE § 3605 (West Supp. 1999); DEL. CODE ANN. tit. 11, § 4209(f) (1995); KY. REV. STAT. ANN. § 431.250 (Michie 1999); LA. REV. STAT. ANN. § 15:570 (West Supp. 1999); NEV. REV. STAT. ANN. § 176.357 (Michie 1997); N.C. GEN. STAT. § 15-190 (Supp. 1997); OHIO REV. CODE ANN. § 2949.25 (West 1997); OKLA. STAT. ANN. tit. 22, § 1015 (West Supp. 1999); S.C. CODE ANN. § 24-3-550(A)(1) (Law. Co-op Supp. 1998); TENN. CODE ANN. § 40-23-116(a)(7) (1997) (providing that a prisoner's family is permitted to attend); WASH. REV. CODE ANN. § 10.95.185 (West Supp. 1999).

¹⁰ See Goodwin, *supra* note 6, at 587.

¹¹ See ARK. CODE ANN. § 16-90-502(3) (Michie Supp. 1997); Goodwin, *supra* note 6, at 588 n.24 (policy of Illinois Department of Corrections).

¹² See Nicholson, *supra* note 1, at 1112, 1113, 1135-36 (noting that post-sentence victim allocation was a key development in the victims' right movement, and that the right to view executions is analogous to post-sentence victim statements because it is intended to help the victim deal with the effects of crime); Sue Anne Pressley, *Execution in Texas: A Satisfying End*

and the rationales behind the legislation appear to be similar—to give the victim a sense of justice that has been missing in the American criminal justice system.¹³ Many family members who have witnessed an execution emphasize the need for closure,¹⁴ and some have expressed the need to ensure the prisoner pays for what he did.¹⁵ Finally, right to view statutes no doubt ensure, as do victim impact statements in capital cases, that the victims of violent crime will play a role in the sentence of the defendant.

III. RIGHT TO VIEW STATUTES AS PUNISHMENT FOR THE CONDEMNED

As a significant preliminary issue, the question of whether right to view statutes authorize punishment of the prisoner must be addressed. Certainly, an argument exists that allowing families of murder victims to view the execution is simply a matter of procedure.¹⁶ Under this reasoning, their presence at the execution is no different than the effect of having prison or state officials there. As such, right to view statutes are a prison regulation governing the imposition of punishment (here, the death penalty) and not itself a form of punishment imposed on the prisoner. However, such reasoning fails to account for the realities surrounding the execution itself, and the United States Supreme Court case law supports the proposition that the family's presence at the execution constitutes punishment.

for *Family of Two Victims*, WASH. POST, Feb. 11, 1996, at A3 (noting that the first execution in Texas witnessed by a victim's family demonstrates a "growing trend in the arena of victims' rights. . . . [Right to view statutes] propelled by advocates who argue the families of murder victims have as much right to be present . . . as the friends and relatives of the dying inmate").

¹³ See Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. LAW 839, 849–56 (1997) (describing the rise of the victims' rights movement as a response to the dissatisfaction many victims felt toward the criminal justice system—its main catalysts was a series of court holdings that victims have no "judicially cognizable interest in the prosecution of another," combined with the surge of criminal rights).

¹⁴ See *infra* note 167.

¹⁵ See *infra* note 168.

¹⁶ Michael Goodwin correctly points out the flaws in labeling right to view statutes procedural as opposed to punitive. See Goodwin, *supra* note 6, at 601. He reasons that if the statutes were procedural in nature, then victims' families could take on more controversial roles in the execution process under the guise of "procedure." See *id.* at 601 (stating that states could allow the family to choose the method of execution or even administer the execution).

A. Punishment, Philosophy, and the Supreme Court

As a starting point, historical notions of legal punishment are broad enough¹⁷ to include the burden imposed by right to view statutes. Legal scholars and philosophers have generally agreed on the core elements of legal punishment: (1) a privation, i.e., an evil, pain, or disvalue,¹⁸ (2) inflicted against one's will,¹⁹ (3) authorized by the state or other proper authority,²⁰ (4) inflicted for a violation of existing rules and a judgment to that effect,²¹ and (5) inflicted on one who has

¹⁷ "As will become evident in the readings which comprise this book, punishment can have a broad meaning which includes anything from a father's reprimand to execution." Rudolph J. Gerber & Patrick D. McAnany, *Introduction to Criminal Law and Criminal Punishment*, in CONTEMPORARY PUNISHMENT 9 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

¹⁸ One author has correctly explained how the term "evil" has, in modern times, taken on a new definition. While in earlier times physical pain or suffering was a prerequisite for punishment, punishment in civilized countries now includes mental pain and suffering, and even more broadly "deprivation of a good the offender would want to keep." IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 1-2 (1989). Primoratz proposes a very formal definition of evil: "anything that people do not want to be inflicted on them." *Id.* at 2. But see JOHN KLEINIG, *PUNISHMENT AND DESSERT* 22 (1973) (arguing that the definition of "deprivation of a right" is too similar to a quasi-legal punishment, unless we refer to natural rights). Kleinig defines imposition of an evil by explaining that it "interferes with a person, it involves a restriction of his freedom, it lays certain restraints upon him, it limits his range of choice." *Id.* at 23.

¹⁹ Punishment does not include the natural consequences of one's offense. For example, one suffering mental defects from the use of illegal drugs may surely be deemed as suffering a privation. But punishment "presupposes a punishing subject. The latter is never the same person that is being punished." PRIMORATZ, *supra* note 18, at 3.

²⁰ There appears to be a split among those who have written on this subject concerning this element. Some believe that an evil (that meets all other criteria) is still a punishment, although an unauthorized one. See KLEINIG, *supra* note 18, at 38. On the other hand, others propose that pain or evil inflicted by one not authorized to do so is revenge. Primoratz argues that:

The victim of the offense, or a relative or a friend, can take revenge on the offender; the mob can lynch him; but neither will be punishment. One can be punished only by a judge, or a jailer, or an executioner; for only these are authorized to do so by the legal order against which he has offended.

PRIMORATZ, *supra* note 18, at 4; see also Anthony Flew, *Definition of Punishment*, in CONTEMPORARY PUNISHMENT, *supra* note 17, at 33-34.

²¹ Kleinig argues against restricting the definition of punishment to just offenses against explicit laws and rules. He proposes that a child may be "punished" by a parent for failing to do as told, under the theory that there is a background of rules assumed by society (in family relationships, the children ought to obey their parents). See KLEINIG, *supra* note 18, at 25. Kleinig goes on further to disagree with academicians who "argue that punishment is inflicted primarily for law-breaking, and dissociate this from moral wrong-doing." *Id.* at 26. Kleinig believes that moral status plays a large role in the legal system and its goal of securing justice.

committed the offense.²² Others have argued that punishment also includes a relation to the commission of the harm, so that it is imposed "proportionately to the gravity of the harm, and aggravated or mitigated by reference to the personality of the offender, his motives and temptation."²³ The nature of punishment, however, must be properly found with reference to its purposes and functions in a given society; punishment does not exist as an abstract definition.²⁴ Society, or those in a position to enforce the objectives of a legal system, can dictate what sanctions will properly be considered punishment for an offense.

The United States Supreme Court has often been called upon to decide what constitutes punishment in the context of various constitutional rights: double jeopardy,²⁵ excessive fines,²⁶ bills of attainder,²⁷ Fifth Amendment right against self-incrimination,²⁸ *ex post facto* laws,²⁹ and due process for pre-trial detainees.³⁰ While some cases focused more on the actual effects of an imposition

He believes that the reluctance to call all penal sanctions punishment, for example parking and hunting fines or other strict liability offenses, stems from the idea that punishment—as opposed to penalty—"applies only to those legal sanctions in which the offender is exposed to moral condemnation." *Id.* at 28. He further explains: "There is a stigma attached to being punished which we are usually reluctant to associate with minor traffic and other administrative offenses . . ." *Id.* at 28.

²² This requirement prevents a punishment from being imposed on a third party for another individual's offense. Note that such a situation could meet all of the other criteria, provided that there is an "evil" or "disvalue" associated with seeing that third party punished (i.e., a family member or close friend).

²³ Jerome Hall, *Just v. Unjust Law*, in CONTEMPORARY PUNISHMENT, *supra* note 17, at 53.

²⁴ *See id.* at 52.

²⁵ *See Hudson v. United States*, 522 U.S. 93, 98–104 (1997) (stating that monetary penalties and occupational disbarment imposed by Office of Comptroller of Currency did not constitute punishment for double jeopardy purposes; statutory scheme demonstrated congressional intent to impose civil sanctions); *Kansas v. Hendricks*, 521 U.S. 346, 355–67 (1997) (finding that the involuntary confinement of the defendant pursuant to the Kansas Sexually Violent Predator Act was not punitive); *United States v. Halper*, 490 U.S. 435, 446–52 (1989) (stating that civil liability under the False Claims Act can constitute second punishment if sufficiently disproportionate to government's expenses).

²⁶ *See Austin v. United States*, 509 U.S. 602, 619–23 (1993) (holding that civil forfeiture after conviction for drug offenses may constitute punishment).

²⁷ *See United States v. Lovett*, 328 U.S. 303, 316 (1946) ("[P]ermanent proscription from any opportunity to serve in the Government is punishment.").

²⁸ *See United States v. Ward*, 448 U.S. 242, 248–55 (1980) (holding that a fine imposed on onshore drilling company for leak constitutes civil penalty).

²⁹ *See Hendricks*, 521 U.S. at 366; *Hawker v. New York*, 170 U.S. 189 (1898) (holding that a statute barring felons from practicing medicine was a proper act of the legislature in setting standards for physicians and did not constitute punishment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (stating that disqualification from the practice of law should be considered punishment).

³⁰ *See Block v. Rutherford*, 468 U.S. 576, 584 (1984) (holding that denial of visits and random shakedowns do not constitute punitive measures for pre-trial detainees).

on the one punished—i.e., the nature and extent of the right or benefit taken away³¹—the Court reasserted its traditional emphasis on analyzing the legislative intent to determine what constitutes punishment in the context of a constitutional right.³²

In *Hudson v. United States*, the Court held monetary penalties and occupational disbarment for bank officers involved in a misapplication of bank funds did not constitute punishment for purposes of double jeopardy.³³ The Court focused on whether a purported punishment was criminal or civil, looking first to what the legislature intended by observing the statute on its face.³⁴ But the Court did maintain a “check” on legislatures, explaining that historically the Court has “inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty.”³⁵ The Court also listed the factors³⁶ it would consider in

³¹ The Court stated in *Halper*: “[Violation of Double Jeopardy] can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state. . . . In making this assessment, the labels ‘criminal’ and ‘civil’ are not of paramount importance.” 490 U.S. 435, 447 (1989); see *Austin*, 509 U.S. at 621–22 (finding that a civil sanction that serves remedial goals, as well as retributive or deterrent purposes, constitutes punishment); *Ward*, 448 U.S. at 253–54 (looking to the nature of the penalty first, and then confirming the conclusion with “overwhelming evidence that Congress intended to create a penalty civil in all respects”); see also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (punishment is confiscation of property or deprivation of liberty).

³² See *Hudson v. United States*, 522 U.S. 93, 100–04 (1997) (holding that forfeiture provisions that impose punishment are consistent with congressional intent as manifested in the text of the statute); *Hendricks*, 521 U.S. at 358–59 (holding that a court must “ascertain whether [the] legislature meant the statute to establish ‘civil proceedings’; if so, we ordinarily defer to the legislature’s stated intent”); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (holding that a provision terminating benefits for aliens who are deported did not “disclose such unmistakable evidence of legislative intent [as] to impose punishment”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730–31 (1893) (finding that deportation is not a punishment because it is “a method of enforcing the return . . . of an alien who has not complied with the conditions upon the performance of which the government, acting within its constitutional authority . . . has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law”).

³³ See *Hudson*, 522 U.S. at 96. The bank officers were indicted for various federal offenses after entering into the administrative settlement. The Court abandoned its test employed in *Halper* and previous cases: “The analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine *Halper*’s deviation from longstanding double jeopardy principles was ill considered.” *Id.* at 100.

³⁴ See *id.* at 98.

³⁵ *Id.* at 98.

³⁶ The factors are:

(1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—

determining whether the statute was otherwise punitive in nature, but required "only the clearest proof" . . . to override legislative intent"³⁷

B. *Viewing a Prisoner's Execution Constitutes Punishment*

There can be little doubt that a court must first attempt to ascertain legislative intent in deciding whether allowing a victim's family members to view an execution is punishment. Beyond the text of the state legislation or prison regulations, there is little to look at, and even the majority of Supreme Court cases dealing with what punishment is involve federal statutes.

A probable motivation behind the right to view statutes and regulations is to respond to the victims' rights movement.³⁸ In this context, the right to view a prisoner's execution could be considered "civil" because it is a remedy to the victim's family—by permitting them to view the execution, they get the satisfaction of seeing justice done and obtaining closure.³⁹ Indeed, the statutes and regulations do not refer to the viewing as criminal punishment (and the right to view is not imposed at a judicial trial), and the conferring of authority on administrative agencies to make judgments on who should attend can be an indication of their remedial purpose.⁴⁰ However, the legislative intent to treat this process as "remedial" is by no means clear. The provisions for viewing executions are contained in the part of each state's code governing sentencing and the death penalty; also, it is at least doubtful that a state could consider the presence of the victim's family as purely civil in nature, given that the process by which the death penalty is administered (as opposed to the death penalty itself) is subject to scrutiny under the Eighth Amendment.⁴¹

retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. at 98.

³⁷ *Id.*

³⁸ See *supra* notes 12–13.

³⁹ See *infra* note 167 and accompanying text; see also Nicholson, *supra* note 1, at 117–18 (stating that post-conviction allocution statements are intended to benefit victims, giving them a sense of participation in the system).

⁴⁰ See *Hudson v. United States*, 522 U.S. 93, 102 (1997); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) ("[C]riminal punishments may be imposed only 'by a judicial trial.'").

⁴¹ See Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 101 (1978) (discussing early Supreme Court cases that identified barbaric means of executions that would be unconstitutional). Thus, a state could not argue that its procedures for imposing the death sentence are not subject to Eighth Amendment review provided the death sentence is permissible. Thus, it is reasonable to believe that provisions providing for witnesses at an

By applying the Court's factors to clarify the ambiguity over whether viewing executions is considered by the legislature to be criminal or civil in nature, right to view statutes appear more punitive.⁴² First, taking away privacy at one's death is an affirmative disability. Death is inherently an intimate moment, and even more so in the context of the death penalty when the condemned knows the exact hour of his or her death. The day of execution is a day full of intense emotion, rituals, gestures of peace, and grasps for the final opportunities at respect.⁴³ As one psychologist suggested:

No matter how prepared for death we think we are and no matter how anxious we are for its occurrence, the moment of death is an awesome event, capable of eliciting unexpected strong feelings. . . . The moment of death sets into motion a sort of life review It is a time for insight and forgiveness, the last chance to say the unsaid, the optimal moment to inoculate the bereaved against the lingering guilts that so often plague them.⁴⁴

execution can be part of the punishment (just like the type of execution could be).

⁴² With respect to right to view statutes, at least one other commentator has reached a similar conclusion. See Goodwin, *supra* note 6, at 601; see also Nicholson, *supra* note 1, at 1121–22 (finding that a Texas statute permitting post-sentence victim allocation subjects defendants to a form of punishment and that it is irrelevant that the statute appears in the state's provisions for criminal procedure).

⁴³ Byron Eshelman, a former death row chaplain, stated: "Only the ritual of an execution makes it possible to endure. Without it the condemned could not give the expected measure of cooperation to the etiquette of dying. . . ." Russell F. Canan, *Burning at the Wire: The Execution of John Evans*, in *FACING THE DEATH PENALTY* 75 (Michael L. Radelet ed., 1989). The story of David Washington's final hours is conveyed in a harrowing narrative:

David's primary concern was for his daughter. He agonized over her having to endure the horror of his execution. [H]e spoke to her: "I want you to make me proud. I don't want you messin' up like I did. . . . I want you to do better than I did. . . . School is important and I want you to do well. . . ." I sat in my chair, stricken by the pathos of the moment. Father was saying goodbye to daughter, imparting advice to help her survive in the world after his death. He was trying to leave a legacy to stand with her through the years. . . . David looked back over . . . at his family for the last time. His expression was tender and sorrowful.

Id. at 121; see also Kenneth Bolton, Jr., *Live from Death Row*, in *THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT* 103 (William A. Schabas ed., 1997); Watt Espy, *Facing the Death Penalty*, in *FACING THE DEATH PENALTY*, *supra*, at 37 (Michael L. Radelet ed., 1989) (describing significance of the moment of death for the death row inmate—many "have shown more consideration for the feelings of their loved ones at the moment of death than they ever showed before. . . . Imminent death brought out surprising compassion and gentleness in some who were considered depraved beyond belief").

⁴⁴ SANDRA L. BERTMAN, *FACING DEATH: IMAGES, INSIGHTS, AND INTERVENTIONS* 78 (1991). She describes the final moment between a father and son, in which the dying father's words are more than just an expression of love, but are healing for the son.

It is human nature to want to die with dignity and peace.⁴⁵ Allowing victims' families to watch the execution, as they anxiously await the prisoner's death, is degrading and disturbing to the prisoner and prevents a peaceful and dignified death.⁴⁶ Such a constraint qualifies as depriving one of a private and dignified moment of death.⁴⁷

⁴⁵ Leo Jenkins's sister, Deborah LeMaster, explained the feelings he conveyed prior to his execution. See Pressley, *supra* note 12, at A3 ("[H]e was troubled that the Kelly family was going to watch him die. He could not understand . . . what it would accomplish. . . . [H]e thought it was low, that the warden would let them watch.").

⁴⁶ See Goodwin, *supra* note 6, at 600 ("Death is an extremely personal and private moment. Forcing an individual to involuntarily share death with unwelcome onlookers violates the basic elements of human dignity."); *id.* at 606 ("Prisoners deprived of any portion of their remaining privacy devalue . . . themselves."); Gardner, *supra* note 41, at 108 ("The moment of one's death is a particularly personal and private occasion. Dignity is offended if this most intimate experience is involuntarily shared with those beyond the closest circle of family and friends."); see also *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring) (stating that cruel and unusual punishments "are thus inconsistent with the fundamental premise . . . that even the vilest criminal remains a human being possessed of common human dignity"); *Halquist v. Department of Corrections*, 783 P.2d 1065, 1066 (Wash. 1989) (en banc) (holding that the First Amendment did not require state warden to allow media representatives to videotape an execution; the inmate's residual right to privacy is legitimate interest for the warden to protect through prison regulations).

⁴⁷ One commentator has proposed that there is a constitutionally protected liberty interest in the privacy of one's moment of death. See Goodwin, *supra* note 6, at 602. With the current U.S. Supreme Court, it is not likely that such a claim will be successful. While the concept of substantive due process originally included privacy rights that, while not explicitly in the text of the Constitution, were considered within the "penumbras" (i.e., zones of privacy) of the Bill of Rights, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives), recent case law has produced the apparent death of this doctrine. In its last two notable substantive due process cases (asserting a fundamental liberty interest), the Court has stated that only liberties "'deeply rooted in this Nation's history and tradition'" are protected by the Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (White, J., plurality opinion) (finding no fundamental right to engage in homosexual acts). The Court also recently held, using the same historical approach, that there is no fundamental right to physician-assisted suicide. See *Washington v. Glucksberg*, 521 U.S. 702 (1997). There are two major reasons why the Court would not likely find, in the context of an execution, this fundamental right to privacy at the moment of death. One, public executions were both common and popular during the origin of our country. See *supra* note 6. Second, and perhaps more importantly in light of the fact that states have moved executions behind prison walls, executions have never been truly private. Though not "public" in the sense of earlier times, when the execution was conducted in the middle of the town square with an open invitation to the community, executions today are still attended by wardens, state officials, citizen witnesses, and physicians.

It is important to note here that such a conclusion does not change the punitive effect of right to view statutes. Though there is no right to privacy at one's death *for substantive due process purposes*, that does not preclude a finding that *for punishment purposes*, right to view statutes operate to deprive the prisoner of dignity at his or her moment of death. Punishment is not necessarily equated with fundamental liberty interests.

Other factors mentioned by the *Hudson* Court also indicate that right to view statutes impose punishment. Certainly, the spectacle of public executions was once considered a form of punishment to the condemned, a forum of shame and humiliation that served a variety of penal purposes.⁴⁸ Also, the right to view an execution only comes into play upon conviction and sentence, satisfying the scienter and criminal action factors. Finally, although it may have the alternative purpose of promoting victims' rights, the right to view executions seem excessive in light of the opportunities already granted by other victims' rights initiatives, especially when compared to the prisoner's pain.⁴⁹

IV. WHAT IS "CRUEL AND UNUSUAL" PUNISHMENT?

A. The "Evolving Standards of Decency"

The Eighth Amendment to the United States Constitution forbids "cruel and unusual" punishments.⁵⁰ Beginning in the later part of the last century, the United States Supreme Court began to wrestle with these three words and what exactly they mean.⁵¹ While initially the Court's position was that the Eighth Amendment only prohibited those forms of punishment that were considered "cruel and unusual" at the time of the Constitution's signing,⁵² the Court shifted away from

⁴⁸ See Blum, *supra* note 6, at 426–27 (describing how governments use public executions to reassert the sovereign's rule of law, arguably serving both deterrent and retributive principles); Margaret Drabble, *A Corrupting Influence*, in *THE HANGING QUESTION: ESSAYS ON THE DEATH PENALTY* 55–56 (Louis Blom-Cooper ed., 1969); MASUR, *supra* note 6, at 27–49.

⁴⁹ See Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 12–16 (1997) (describing rights granted to victims under state constitutions, including being notified of all proceedings and allowing victim's input in important prosecutorial decisions); Cellini, *supra* note 13, at 854–55 (indicating that the Victims' Rights and Restitution Act of 1990 provided victims with the right to be notified of all proceedings and to confer with an attorney for the government in each case). Additionally, the United States Supreme Court has ruled that the Constitution does not erect a per se bar on victim impact testimony at the sentencing stage of capital trials. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, relatives of the victim already have an adequate opportunity to express their emotions to the prisoner.

⁵⁰ The Eighth Amendment is applicable to the states. See *California v. Robinson*, 370 U.S. 660, 664 (1962). Also, the Eighth Amendment sets substantive limits on what the state can punish. See *id.* at 666–67 (finding that a law which makes it a crime to be addicted to drugs is "cruel and unusual" punishment).

⁵¹ See *In re Kemmler*, 136 U.S. 436, 446 (1890) (stating that the Court cannot decide if electrocution is a "cruel and unusual" punishment because the Eighth Amendment is not applicable to the states, and that the state did not act arbitrarily or apply its death penalty law unequally); *Wilkerson v. Utah*, 99 U.S. 130, 137 (1878) (stating that it does not offend the Eighth Amendment for a judge to prescribe the mode of execution after conviction).

⁵² See Gardner, *supra* note 41, at 99–100 (discussing how "historical interpretation" of the Eighth Amendment was the primary judicial tool well into the 20th century). If the historical

such a historical approach to a more dynamic approach.⁵³ Finally, in the case of *Trop v. Dulles*,⁵⁴ the Court laid out what has become the famous benchmark in Eighth Amendment jurisprudence: whether the punishment conforms with the "evolving standards of decency that mark the progress of a maturing society."⁵⁵

Here, the Court's jurisprudence takes three distinct turns. Over the next thirty years, a significant portion of the Court's attention became focused on applying this standard to the death penalty as it existed in the states.⁵⁶ To decide death penalty cases, the Court used three institutions in deciding whether such a sentence conformed to the "evolving standards of decency": legislatures, sentencing juries, and the Court's own evaluation.⁵⁷ Though this approach has only been used with the death penalty,⁵⁸ it could, theoretically, still play a role in other Eighth Amendment challenges to punishments imposed by federal or state legislation. However, at the same time, the Court accepted the growing trend among the federal circuits that the Eighth Amendment applies to prisoners after their sentencing.⁵⁹ Therefore, the Court was also faced with turning its attention

interpretation model had remained viable, right to view statutes would likely be constitutional because public executions were acceptable under the common law of England and during the early years of our country. *See supra* note 6.

⁵³ *See Weems v. United States*, 217 U.S. 349, 373, 378 (1910) (holding that the "cruel and unusual" clause should "acquire meaning as public opinion becomes enlightened by a humane justice . . . [and as] []time works changes, brings into existence new conditions and purposes").

⁵⁴ 356 U.S. 86, 103 (1958) (holding that losing citizenship as a punishment for military desertion is "cruel and unusual" punishment).

⁵⁵ *Id.* at 101.

⁵⁶ The Court eventually concluded that the death penalty is not per se violative of the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁷ *See Earl Martin, Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 100-18 (1997).

⁵⁸ The Court has not evaluated other modes of punishment with this formula. In fact, no method of execution has even been reviewed to determine its constitutionality. *But see* Gardner, *supra* note 41, at 99-103 (discussing how the Court has indirectly approved certain methods of execution).

⁵⁹ *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (stating that deliberate indifference to a prisoner's medical needs can constitute "cruel and unusual" punishment); *see also* Hudson v. McMillian, 503 U.S. 1, 10 (1992) (noting that the Court has recognized that the Eighth Amendment applies to deprivations that were not specifically part of a prisoner's sentence); Johnson v. Glick, 481 F.2d 1028, 1031 (2d Cir. 1973) (finding no reason that the Eighth Amendment should not apply to prison conditions or the way a death penalty is carried out); Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968) (arguing that with respect to the Eighth Amendment, there is no distinction between statutorily imposed punishments and those imposed for prison discipline reasons). Indeed, prior to *Estelle*, federal courts had recently begun to hold the Eighth Amendment applicable to prisoner claims. *See Jackson*, 404 F.2d at 577 (citing cases in which relief was granted); *see also* Candace McCoy, *The Impact of Section 1983 Litigation on Policymaking in Corrections: A Malpractice Lawsuit by Any Name Would Smell as Sweet*, in *THE DILEMMAS OF PUNISHMENT* 226 (Kenneth C. Haas & Geoffrey P. Alpert eds., 1986) (discussing how, in the late 1960s, federal judges began to review prison facilities

to America's prisons, deciding that prison administrative measures constitute "cruel and unusual" punishment if they impose an "unnecessary and wanton infliction of pain." Finally, the Court recently faced the question of whether the Eighth Amendment contains a "proportionality" guarantee that prohibits excessive prison terms for certain crimes.

In and of themselves, these standards—"proportionality," the "three-institution test," and the "unnecessary and wanton infliction of pain"—appear to create three different levels of protection against "cruel and unusual" punishments. Despite approaching the Eighth Amendment from the three different worlds of prison terms, the death penalty, and prison conditions, the Court has consistently used the same rationale when deciding whether a punishment is "cruel and unusual."

B. Toward One Meaning of the Words "Cruel and Unusual"—Society's Justifications for Punishment

In our criminal justice system, sentences are traditionally imposed with an eye toward some penological justification.⁶⁰ Such a proposition is not novel. But

and policies and declare them unconstitutional under the Eighth Amendment).

⁶⁰ Although there is no explicit federal constitutional requirement that a punishment be justified by certain policies, several states have taken measures to impose such a requirement. See, e.g., IDAHO CODE § 19-2521(1) (1997) (providing that courts shall not impose imprisonment unless necessary for the protection of the public, because it will be a deterrent to the defendant or other members of the community, or the "defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution . . . or a lesser sentence will depreciate the seriousness of the defendant's crime"); ILL. CONST. art. I, § 11 (West 1997) ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); N.J. STAT. ANN. § 2C:44-1 (West 1995) (providing that in determining the appropriate sentence for a defendant convicted of a criminal offense, a court should consider the need for deterring the defendant and the community, and the gravity and seriousness of the offense); 42 PA. CONS. STAT. ANN. § 9721(b) (West 1998) ("[C]ourt[s] shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."); TEX. PENAL CODE ANN. § 1.02 (West 1994) ("[P]rovisions of this code . . . shall be construed, to achieve the following objectives: (1) to insure the public safety through: (A) the deterrent influence of the penalties. . . (B) the rehabilitation of those convicted of violations . . . and (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior."); State v. Buza, 886 P.2d 1318, 1322 (Alaska Ct. App. 1994) ("[S]entences . . . should . . . fulfill each sentencing goal to the maximum extent possible; when no active conflict exists between the goal of rehabilitation and other goals such as deterrence and community condemnation, . . . focus on rehabilitation as the primary goal will not justify a sentence that unnecessarily slights the other goals."); The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines), 451 So. 2d 824, 825 (Fla. 1984) ("The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be the desired goals of the criminal justice system

this proposition takes on an even more important meaning when analyzing Eighth Amendment challenges to punishments, because reliance on these justifications is essentially the core underlying such cases.

1. *Prison Terms*

Although itself alone not a traditional justification for punishment, the principle of proportionality is deeply rooted in retributive and utilitarian justifications for punishment. Under retributive justifications for punishment, society metes out a punishment that is comparable to the offense committed; to ensure the offender receives what is justly deserved for his or her crime, a proportionality scheme is created.⁶¹ Under utilitarianism, the principle of proportionality serves as the upper limit on society when it exacts a benefit from punishing its offenders; without proportionality, society would be free to impose grossly unjust punishments on individuals if the benefit to society would be of equal or greater value.⁶²

Although the Court-created proportionality guarantee originated in a 1913 case challenging the conditions of imprisonment,⁶³ recent cases have addressed the principle in Eighth Amendment challenges to lengths of sentences.⁶⁴ *Solem v.*

but must assume a subordinate role.”); *State v. Randleston*, 681 So. 2d 936, 936 (La. 1996) (“[I]n order to find the punishment [imposed by statute] . . . excessive, the trial judge must find that the sentence made no measurable contribution to the acceptable goals of punishment or that sentence amounted to nothing more than the purposeful imposition of pain and suffering.”); see also *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (stating that the goals of the penal function in the criminal justice system are “to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens”); MODEL PENAL CODE § 1.02(2), reprinted in CRIMINAL LAW 1161 (John Kaplan et. al. eds., 3d ed. 1996) (stating that the general purposes of sentencing include deterrence, rehabilitation, and retribution); KLEINIG, *supra* note 18, at 65 (“Impositions require justification since they constitute breaches of a basic moral right to be free from such things.”); STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 101 (1987) (“If . . . [criminal punishments] are justified, what justifies them is the necessity of performing them to achieve some extremely worthwhile end. They may be performed only to the extent that they contribute to this end. If they do not contribute, they become acts of cruelty.”). The 1972 edition of the Model Sentencing Act, prepared under the National Council on Crime and Delinquency, stated: “Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation Dangerous offenders shall be identified, segregated, and correctively treated in custody for as long terms as needed.” ANDREW VON HIRSCH, DOING JUSTICE 9 (1976).

⁶¹ For a more comprehensive discussion of retribution and the principle of proportionality, see *infra* notes 148–49 and accompanying text.

⁶² For a more comprehensive discussion of how utilitarian punishments are limited by the principle of proportionality, see *infra* notes 135–36 and accompanying text.

⁶³ See *Weems v. United States*, 217 U.S. 349, 371 (1910).

⁶⁴ See *Harmelin v. Michigan*, 501 U.S. 957, 966–94, 996–1001 (1991); *Solem v. Helm*, 463 U.S. 277, 284–96 (1983); *Hutto v. Davis*, 454 U.S. 370, 372–81 (1982); *Rummel v.*

Helm involved a state recidivist statute under which an individual is sentenced to life imprisonment upon conviction for his or her third felony. A majority of the *Solem* Court rejected the state's assertion that the principle of proportionality does not apply to felony prison sentences.⁶⁵ Although recognizing that a court should grant substantial deference to the broad authority of the legislature in determining sentences for crimes,⁶⁶ the *Solem* majority stated that no penalty is per se constitutional and specified the objective factors which should guide reviewing courts: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.⁶⁷ The first of these factors is the very nature of a retributive analysis—ensuring the criminal gets what he or she deserves.⁶⁸

Moreover, the Court's framework for application of these objective factors further illustrates the thesis of this Note—that punishments are "cruel and unusual" when they conflict with society's justifications for punishment. While suggesting that there is not necessarily one justification for imposing a life sentence for repeat felony convictions,⁶⁹ comparisons should at least be made in light of the harm caused or threatened to the victim or society,⁷⁰ the culpability of the offender,⁷¹ and even the goals of incapacitation.⁷²

In *Harmelin v. Michigan*, the Court's most recent decision addressing the proportionality guarantee, the prisoner challenged the imposition of a mandatory life sentence for possessing more than 650 grams of cocaine.⁷³ Although Justice Scalia and Chief Justice Rehnquist argued that the Eighth Amendment contains no proportionality guarantee,⁷⁴ a plurality of the Court instead narrowed the

Estelle, 445 U.S. 263, 271–76 (1980).

⁶⁵ See 463 U.S. at 288–89. Just three years prior to *Solem*, the Court held that the principle of proportionality announced in *Weems* is restricted to the facts of that case, and the length of a prison sentence actually imposed is purely a matter of legislative prerogative. See *Rummel*, 445 U.S. at 272–75.

⁶⁶ Although the dissent argued otherwise, the majority stated that it was not endorsing a general rule of appellate review of sentences. See *Solem*, 463 U.S. at 290 n.16.

⁶⁷ See *id.* at 290–92.

⁶⁸ This concept is often referred to as a criminal receiving his or her "just deserts."

⁶⁹ See *id.* at 294.

⁷⁰ See *id.* at 292–93.

⁷¹ See *id.* at 293.

⁷² See *id.* at 297 n.22 ("Incarcerating . . . [the petitioner] for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way.").

⁷³ The prisoner challenged his sentence on two particular grounds: (1) it was "'significantly disproportionate' to the crime he committed," and (2) the "sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal." *Harmelin*, 501 U.S. at 961–62.

⁷⁴ In his opinion, Justice Scalia arrives at this conclusion by examining the old "Cruell and Unusuall" Punishments Clause in the English Declaration of Rights, the intent of the Framers,

proportionality guarantee by holding that it only forbids "extreme sentences that are 'grossly disproportionate' to the crime."⁷⁵ According to these Justices, the second and third *Solem* factors only apply in the rare situations in which an inference of gross disproportionality arises from applying the first factor—comparing the gravity of the offense with the length of the sentence.⁷⁶ Thus, in light of the fact that the dissent argued for application of all three *Solem* factors,⁷⁷ *Harmelin* affirms the Court's position that the review of a prison term under the Eighth Amendment *at least* requires some consistency with the retributive ideal of "just deserts."⁷⁸

and the actions of the First Congress. However, this position taken by the Chief Justice and Justice Scalia appears to contradict the lesson of *Trop v. Dulles* that the Eighth Amendment not only forbids punishments considered "cruel and unusual" at the time of the Constitution's signing, but also punishments that do not "conform with the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

⁷⁵ *Harmelin*, 501 U.S. at 1001.

⁷⁶ See *id.* at 1005. At least two circuit courts have adopted this scheme as a matter of law. See *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); *United States v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997). The Fourth Circuit has held that in so far as *Harmelin* did not overrule *Solem*, application of the three *Solem* factors is still the appropriate analysis in proportionality reviews. See *United States v. Kratsas*, 45 F.3d 63, 67 (1995).

⁷⁷ See *id.* at 1021–27. Justice Stevens, in his dissenting opinion, went further: "Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'" *Id.* at 1028.

⁷⁸ Circuit courts have indeed relied on society's justifications for punishment when applying the first *Solem* factor. See, e.g., *Hawkins*, 200 F.3d at 1284 (stating that petitioner's "crimes surely merit the punishment he received" because although his "culpability may be diminished somewhat due to his age at the time of the crimes, it is arguably more than counterbalanced by the harm . . . caused to his victim"); *Kratsas*, 45 F.3d at 68 (applying *Solem*'s first prong, offense of drug distribution is "immensely grave," particularly because: (1) petitioner is not just a drug user, or a single distributor, but part of a ring of distributors; (2) a large amount of cocaine, specifically 18 kilograms, was directly attributable to petitioner; and (3) petitioner was a repeat drug offender); *Simmons v. Iowa*, 28 F.3d 1478, 1482–83 (8th Cir. 1994) (holding that petitioner's crimes "all are properly the objects of severe condemnation"). Another court held that a 55-year sentence for multiple counts of residential burglary and related offenses was consistent with the purposes behind incapacitation. See *Bocian v. Godinez*, 101 F.3d 465, 472–73 (7th Cir. 1996) (holding that a state court's conclusion that "consecutive terms were required to protect the public, especially the elderly, from further criminal conduct by defendant because the record convincingly demonstrates that defendant is an inveterate criminal utterly devoid of any rehabilitative potential" permissible under *Harmelin*). Finally, one court appeared to rely on the principles of general deterrence as justification for imposing sentences to run consecutively in order to effectively impose a sentence of life imprisonment. See *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (applying the "grossly disproportionate" standard of the plurality, in light of petitioner's conduct, which by all accounts significantly facilitated narcotics trafficking on a massive scale, "Congress—not the judiciary—is vested with the authority to define, and attempt to solve, the societal problems

To give substantive limits to this comparison, the plurality, after reviewing the history of the principle of proportionality in the Court's jurisprudence and realizing that its precise contours are unclear,⁷⁹ concluded that "close analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review."⁸⁰ Again, at the root of these common principles is a reliance on society's justifications for punishment. First, "fixing of prison terms for specific crimes involves a substantive penological judgment," and more importantly, the "efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system."⁸¹ Second, the plurality laid out what other factors reviewing courts should consider:

[T]he Eighth Amendment does not mandate adoption of any one penological theory. "The principles which have guided criminal sentencing . . . have varied with the times." . . . The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. . . . And competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic.⁸²

Thus, the question of whether a prison sentence conflicts with society's justifications for punishment serves as the basis for defining the Eighth Amendment's proportionality guarantee, in an objective manner and consistent with the need to respect the legislature's judgment on what are the permissible aims of punishment. In essence, although changing over the years, society's justifications for punishment set limits on the legislatures when they impose lengthy prison terms for certain crimes; beyond these limits, such prison terms are "cruel and unusual."

2. The Death Penalty

Other than the death penalty, the Court has been reluctant to review the constitutionality of a *form* of punishment imposed by a trial court.⁸³ Even

created by drug trafficking across national and state borders").

⁷⁹ See *id.* at 998.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 999.

⁸³ A possible area in which the Court may use the "three-institution" approach is denunciation punishments. Denunciation punishments, once popular in colonial times, have begun to re-emerge. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1882 (1991). Denunciation proposes "that those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents." Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 331 (1990). The

Supreme Court Justices have indicated that judicial review of the death penalty is a separate species of Eighth Amendment law.⁸⁴ However, a discussion of the

basic premise of denunciation is that by embarrassing the offender, society's cohesion and belief in the rules of law are strengthened. State trial courts have begun to use this form of punishment again. For example, in 1989 a Rhode Island judge ordered a convicted child molester to place the following statement, with his picture, in the local paper: "I am Stephen Germershausen. I am 29 years old. . . . I was convicted of child molestation. . . . If you are a child molester, get professional help immediately, or you may find your picture and name in the paper. . . ." Massaro, *supra*, at 1881; see also *id.* at 1182 (discussing how an Oregon judge ordered convicted persons to make apologies in the newspaper and one punishment required a car thief to place a sign in his yard displaying the words "I am a thief"). Denunciation is particularly susceptible to "cruel and unusual" punishment challenges because of the role of embarrassment—specifically, when it crosses the line into degrading the human dignity.

The Court has not had an opportunity to directly rule on the constitutionality of denunciation punishments. However, the Court ruled that a Nevada DUI statute that imposes 48 hours of community service while dressed in clothing identifying the convicted as a drunk driver—in lieu of up to six months imprisonment—does not constitute a "serious offense" so as to require a right to a jury trial. See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543–44 (1989). The Court stated:

The most relevant criterion for determining the seriousness of an offense is the severity of the maximum authorized penalty fixed by the legislature. Under this approach, when an offense carries a maximum prison term of six months or less, as DUI does under Nevada law, it is presumed to be petty unless the defendant can show that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a "serious" one.

Id. at 538. This decision seemingly indicates that the Court, at least in the context of typical denunciation punishments that serve only to embarrass the offender, may not view denunciation punishments as degrading enough to constitute "cruel and unusual" punishment.

In the context of this Note, though, denunciation could not serve as a justification for right to view statutes because only members of the victim's family view the execution. As Toni Massaro discusses in her article, the cornerstone of denunciation is the holding of the guilty out to society for *community* rebuke and affirmation of its values, not holding out the guilty only to individual members of society who have been most harmed by the offense. See Massaro, *supra*, at 1883. When only select individuals are used for denunciation, there is a tendency for private motivations to replace that of society's moral condemnation. See *infra* notes 158–65 and accompanying text. Additionally, to be effective, the offender must be a member of an identifiable group, and the denunciation punishment must injure the offender's standing within that group. See *id.* at 1883. Allowing the victim's family to view the prisoner's execution does not satisfy this basic condition because the death row inmate rarely has any standing at stake within the very small crowd of the victim's family. Finally, and worth noting here, executions are final, and there is no chance for reunion with the community; denunciation, on the other hand, relies on "the reacceptance of a contrite offender. . . . [T]otal banishment is a rare consequence: the offender may humble himself and thereby be reintegrated into the social fabric." *Id.* at 1910.

⁸⁴ See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (plurality opinion). Justice Scalia argued in his plurality opinion that the Eighth Amendment does not contain a proportionality

"three-institution" test is necessary because it is consistent with relying on society's justifications for punishment to determine whether a particular punishment is "cruel and unusual."

After deciding in *Furman v. Georgia* that the death penalty—as applied in the states at the time—was violative of the Eighth Amendment,⁸⁵ the Court laid out the "three-institution" test in reviewing Georgia's new statutory scheme for imposing the death sentence.⁸⁶ Undoubtedly, the response of the state legislatures to the death penalty has been the most influential. Although there has been dispute over whether the authorization of the death penalty or the actual use of it is determinative,⁸⁷ the Court has continued to rely heavily on this prong in recent cases.⁸⁸ Furthermore, this deference to the legislature essentially works as a presumption for constitutionality, with the Court requiring a significant number of states opposing the penalty in order to conclude it is "cruel and unusual."⁸⁹ While the behavior of juries in imposing the sentence in a given circumstance has played a role,⁹⁰ low percentages of sentences issued by juries tends to indicate refinement instead of repudiation of the process by which states impose the death penalty.⁹¹

Finally, the role of the Court in reviewing capital sentences evolved into three distinct positions among the Justices. The first position, taken by Justices Scalia, Rehnquist, White, and Kennedy, has effectively limited the Court's role to simply ascertaining what the objective data is with respect to society's tolerance for the

guarantee. The defendant was convicted of possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without possibility of parole (the court also refused to hear mitigating factors, such as the fact that defendant had no prior felony convictions). In distinguishing his conclusion from prior death penalty cases where the Court relied on proportionality review, Justice Scalia stated: "[We] treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. . . . Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." *Id.* at 994; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor J., concurring) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments."); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (stating that the death penalty is treated differently than other sentences).

⁸⁵ 408 U.S. 238 (1972) (*per curiam*).

⁸⁶ *See* *Martin*, *supra* note 57, at 97.

⁸⁷ *See id.* at 100.

⁸⁸ *See id.* at 101.

⁸⁹ *See id.* at 102 (explaining how in *Stanford v. Kentucky*, the Court upheld the death penalty for a defendant who was 17 years old at the time of offense, disregarding the fact that 28 states did not allow executions in such an instance).

⁹⁰ *See* *Thompson v. Oklahoma*, 487 U.S. 815, 831–33 (1988) (finding it unconstitutional to execute a defendant who was under 16 years old at the time of his offense, and holding it significant that throughout United States history, juries have sentenced to death less than 20 defendants in this category); *see also* *Martin*, *supra* note 57, at 105.

⁹¹ *See* *Martin*, *supra* note 57, at 104.

death penalty; there should be no independent judgment brought by the Court.⁹² The second position, originally taken by Justices Brennan, Marshall, Blackmun, and Stevens, insists that the Court has an independent role⁹³ in determining the proportionality⁹⁴ and justification⁹⁵ for the death sentence. Finally, Justice O'Connor lies "somewhere between the previous two camps"⁹⁶ discussed above. While she has maintained that the Court has an independent duty to review the proportionality of the death sentence,⁹⁷ she has backed away from the Court's role in determining the penological justification for the death penalty.

Though many of the Court's cases point to an emphasis on retribution or deterrence in determining its position on the death penalty,⁹⁸ the plurality and concurring opinions in the recent case of *Stanford v. Kentucky* fail to mention

⁹² See *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (Scalia, J., plurality opinion). Justice Scalia stated:

[T]o say . . . that it is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

Id. at 379; see also Martin, *supra* note 57, at 111–12. Justice Scalia has also stated: "My colleagues and I don't know what John Q. Public thinks." Tony Mauro, *Steering Clear of Controversy Court's Inaction Allows Confusion*, USA TODAY, Dec. 23, 1998, at 1A. "On issues such as abortion or right to die, 'Why would you leave that to nine lawyers, for heaven's sake?'" *Id.*

⁹³ See Martin, *supra* note 57, at 112–13.

⁹⁴ See *id.* at 109, 112–13.

⁹⁵ See *Stanford*, 492 U.S. at 405 (Brennan, J., dissenting) ("Because imposition of the death penalty on persons for offenses committed under the age of 18 makes no measurable contribution to the goals of either retribution or deterrence, it is 'nothing more than the purposeless and needless imposition of pain and suffering' . . . and is thus excessive and unconstitutional."); *Thompson*, 487 U.S. at 836–38 (Stevens, J., plurality opinion) (holding that the execution of a prisoner who was 15 years old at the time of his murder does not serve retributive or deterrent goals of society); *Enmund v. Florida*, 458 U.S. 782, 798–800 (White, J., plurality opinion) (finding that a death sentence for a defendant who aids and abets a felony but does not intend lethal force to be used violates Eighth Amendment because it serves no retributive or deterrent functions).

⁹⁶ Martin, *supra* note 57, at 113.

⁹⁷ See *id.* at 114.

⁹⁸ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989) (finding that a death sentence for a mentally retarded defendant was not per se in violation of the retributive purposes behind capital punishment); *id.* at 348–49 (Brennan, J., concurring in part and dissenting in part) ("killing mentally retarded people does not measurably further the penal goals of either retribution or deterrence."); *Enmund*, 458 U.S. at 798–99 (White, J., plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976) (Stewart, J., plurality opinion).

either. Did this signal a possible end to the Court's reliance on these two justifications? Justice Scalia's camp, in gaining the vote of Justice O'Connor in this decision, did not state that a penological justification is unnecessary; on the contrary, what occurred is that the Court in fact deferred to the legislatures to make that determination:

The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to identify the "evolving standards of decency"; to determine, not what they should be, but what they are. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence [of whether a 16-year old is adequately responsible or significantly deterred] for the society's apparent skepticism.⁹⁹

Thus, the Court's shift away from addressing the justification for the death penalty should not be interpreted as an abandonment of the requirement that the death penalty not conflict with the goals of retribution and deterrence. In fact, the Court's emphasis on objective data such as similar legislative enactments and juries' behavior embodies the very inquiry this Note proposes—in the context of the death penalty and its finality, they are the best evidence of whether a death sentence conflicts with society's justifications for punishment.

3. Prison Administration

The Eighth Amendment's prohibition on "cruel and unusual" punishments also applies to prison conditions. The Court has consistently used the "unnecessary and wanton infliction of pain"¹⁰⁰ standard to resolve prison

⁹⁹ *Stanford*, 492 U.S. at 378 (plurality opinion) (emphasis omitted). However, it should be noted that Justice Scalia apparently would invalidate the death penalty on equal protection grounds if the penalty completely failed to advance retributive or deterrent goals. *See id.* at 378. But, either way, Scalia's analysis allows the legislature to make the determination of whether socio-scientific evidence on the death penalty's deterrence is reliable or not.

In her concurring opinion, Justice O'Connor found no general legislative rejection of the execution of a 16-year-old that would constitute a clear national consensus. *See id.* at 381–82 (O'Connor, J., concurring). However, on one issue she did disagree with the plurality, stating that "beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional." *Id.* at 382.

In *Thompson v. Oklahoma*, Justice Scalia wrote that it is up to the Court "to judge whether certain punishments are forbidden because . . . of the 'evolving standards of decency' of our national society; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on this Court." 487 U.S. at 873 (Scalia, J., dissenting) (emphasis omitted).

¹⁰⁰ "Punishments 'incompatible with the evolving standards of decency that mark the

complaints of constitutional violations, emphasizing the limited role the Eighth Amendment plays in regulating prison administration.¹⁰¹ The Court has engaged in two distinct inquiries to decide if prison action has risen to the level of this constitutional standard.¹⁰² The subjective inquiry—whether the prison official acted with the purpose of causing unnecessary pain—is easily met by the act of a legislature or a prison regulation that specifies prison procedures.¹⁰³ As Justice Thomas noted: “We . . . [do] not separately inquire whether the legislature had acted with ‘deliberate indifference,’ since a statute, as an intentional act, necessarily satisfies an even higher state-of-mind threshold.”¹⁰⁴ The second inquiry is objective in nature, and focuses on whether “the alleged wrongdoing was . . . ‘harmful enough’ to establish a constitutional violation.”¹⁰⁵ While only serious deprivations of rights—considered in light of contemporary standards of decency—will be sufficient to constitute a constitutional violation, there is no requirement that the prisoner suffer serious injury.¹⁰⁶ This Note will now explain

progress of a maturing society’ or ‘involving the unnecessary and wanton infliction of pain’ are ‘repugnant to the Eighth Amendment.’” *Hudson v. McMillian*, 503 U.S. 1, 10 (1992). In breaking down the text of this rule, it seems possible to conclude that a form of punishment—considered decent by societal standards—may run afoul of the Constitution simply because of its unnecessary application or the situation in which it is administered. While no case can be directly cited for this proposition, this rationale becomes somewhat apparent in the context of solitary confinement and prison abuse cases. *Cf. Nelson v. Heyne*, 491 F.2d 352, 355 n.6 (7th Cir. 1974) (“We do not hold that all corporal punishment in juvenile institutions or reformatories is per se cruel and unusual.”); *Novak v. Beto*, 453 F.2d 661, 671 (5th Cir. 1971) (holding that solitary confinement is not unconstitutional per se); *Bethea v. Crouse*, 417 F.2d 504, 509 (10th Cir. 1969) (“What force amounts to simple assault and battery and how much more force amounts to cruel and unusual punishment is a difficult question of degree.”); *Battle v. Anderson*, 376 F. Supp. 402, 422–23 (E.D. Okla. 1974) (“Cruel and unusual punishment may be inflicted by the unconscionable penalty imposed by a statute or by the inhumane execution of a permissible penalty . . .”), *rev’d on other grounds*, 993 F.2d 1551 (10th Cir. 1993).

¹⁰¹ See *Hudson*, 503 U.S. at 20.

¹⁰² See *id.* at 8.

¹⁰³ Obviously, this inquiry is not always easily approached. See *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (holding that an instance in which a guard shot an inmate in the leg was a necessary prison security measure and opining that, in light of safety concerns during a disturbance, the question is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm”); *Estelle v. Gamble*, 429 U.S. 97, 97 (1976) (holding a warden and the prison system liable only upon a showing of deliberate indifference to the medical condition of the prisoner).

¹⁰⁴ *Hudson*, 503 U.S. at 21.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* at 9. This is important to note in countering the argument that prisoners are not significantly harmed by having the victim’s family view the execution. *But see supra* note 45 (comments by death row inmate at execution indicate he was troubled and distressed by the attendance of the victim’s family). Assuming that statement was true, the constitutionality of right to view statutes may still be in question.

how, in adjudicating Eighth Amendment claims arising from prison conditions, courts have again turned to the question of whether the punishment imposed conflicts with society's justifications for punishment.¹⁰⁷

¹⁰⁷ There is, perhaps, another situation within the prison administration context in which Eighth Amendment claims may arise. In prison security cases, the competing concerns of an orderly administration of prisons are balanced with the rights of the prisoner. "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which [the] . . . objection is lodged." *Whitley*, 475 U.S. at 320; *see also* *Bethea v. Crouse*, 417 F.2d 504, 507 (10th Cir. 1969) (stating that a delicate balancing process exists, but that it is "unnecessary to accommodate the prisoners' rights against the Warden's disciplinary powers . . . [because] this was a disciplinary case, where prison authorities were called upon to preserve order or were justified in exerting necessary force to restrain or punish a prisoner"). Here, the determinative issue in a prisoner's Eighth Amendment claim is the interest in security and the necessary imposition of punishment: Security, and not incapacitation, deterrence, or rehabilitation, is the justification for punishment. Depending on the circumstances surrounding the punishment, the courts defer to the prison officials to decide what measures are necessary to maintain a safe prison system. The Court has stated that prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Hudson*, 503 U.S. at 6. Generally, this theme of deference to legislatures was reflected in Justice Powell's concern that once the Court holds that a form of punishment violates the Eighth Amendment, only a constitutional amendment or a subsequent overruling can change it. *See* *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (arguing that the Court should exercise restraint in its decisions). For example, in *Estelle v. Gamble*, the Court held that because medical needs do not conflict with prison regulations and concerns, a claimant alleging deprivation of medical care need only prove "deliberate indifference" rather than actual intent. 429 U.S. at 104. On the other hand, in the context of a prison disturbance, the Court required a claimant shot in the leg to show that the force was applied "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. *But see* *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990) (holding physical assault of inmate while being transferred to "lockdown area" was clearly excessive and caused unnecessary and wanton infliction of pain), *rev'd*, 503 U.S. 1 (1992). This contrast in standards highlights the Court's sensitivity to those measures necessary to maintain a safe and orderly penological system.

Because punishment can be imposed in the name of security, and with no mention of a traditional penological justification, security measures may appear to be an anomaly that does not fit Eighth Amendment case law. Maintaining security is not in the classic form of retribution or utilitarianism, and the courts have seemingly "carved out" an exception for real-life necessities in prisons. But as a matter of theory, punishment for the purpose of maintaining security makes sense because utilitarian and retributive goals of punishment cannot be met if there are riotous conditions or violent crimes in the prison system. Thus, when punishment is necessary to maintain order in prisons, the courts should find that those measures do not conflict with society's justifications for punishment and dismiss an Eighth Amendment challenge. *See, e.g.,* *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir. 1993) (finding that cross gender searches of female inmates violate the Eighth Amendment because "the security interests of the [prison] have been adequately fulfilled by the actions of its administrative officials, prior to [implementation of new procedures]"); *Battle v. Anderson*, 376 F. Supp. 402, 423 (E.D. Okla. 1974) (holding that the use of chemical agents to control prison crowds was a "cruel and

In the many Eighth Amendment cases that have arisen over prison conditions and discipline, courts have generally held that a "deprivation of basic human needs," degrading acts, or lack of a "minimal civilized measure of life's necessities" constitutes the "unnecessary and wanton infliction of pain."¹⁰⁸ But in practice, such terms are conclusory; as in the context of the death penalty and the Court's "three-institution" test, and the "proportionality" guarantee in prison term cases, these terms would be meaningless unless we knew: (1) how courts determine where the line is drawn, i.e., what conditions are sufficiently inhumane to constitute the "unnecessary and wanton infliction of pain," and (2) the role of the courts in making that determination.

The answer to the former question is found by again turning to society's justifications for punishment. While some prison conditions may be so degrading as to be "cruel and unusual" regardless of any justification,¹⁰⁹ prison-imposed punishments often involve much more difficult judgments on what is an "unnecessary and wanton infliction of pain." Courts that have determined the constitutionality of prison-imposed punishments have, to varying extents, relied on the goals of rehabilitation,¹¹⁰ deterrence,¹¹¹ incapacitation,¹¹² and

unusual" punishment because no proper justification based on a reasonable concern for the security of the institution existed), *rev'd on other grounds*, 993 F.2d 1551 (10th Cir. 1993).

¹⁰⁸ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹⁰⁹ See *Wright v. McMann*, 387 F.2d 519, 521 (2d Cir. 1967) (describing the inhumane conditions that a prisoner was subjected to: His toilet and sink were encrusted with human excremental residue, he went without clothing and entirely nude for several days, his window was left open and his cell exposed to sub-freezing temperatures, and he was provided with no utensils for hygiene). Similarly, certain forms of punishment that existed at the time of the Constitution's signing may fall into this category. See *Gardner*, *supra* note 41, at 100 ("[A]ncient practices of disembowelling while alive, drawing and quartering, public dissecting, and burning alive . . . [are] the kinds of 'terror, pain, or disgrace' proscribed by the [E]ighth [A]mendment."). However, it should not be assumed that no reliance on penological justifications is necessary to conclude such punishments are "cruel and unusual." Because such punishments may operate to erode the moral standards of our society, principles of retribution may support such a conclusion. See *infra* notes 154-57 and accompanying text. Alternatively, the costs of such punishments (the evil endured by society) may outweigh any benefit society receives from imposing the punishment, thus violating fundamental principles of utilitarianism. See *infra* note 135. Finally, principles of proportionality may well operate to limit such barbaric punishments in the context of many crimes.

¹¹⁰ See *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) (holding that the following factors contributed to an Eighth Amendment violation: crowded conditions and discomfort of heat in the summer, a diet—while minimally adequate—that was not balanced, and lack of physical exercise and conditioning), *overruled by International Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (1986); *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980) (stating that the "detrimental physical consequences of enforced idleness in a small living space[] and the negative effect of overcrowding on prisoners' mental states is well documented," and thus the lack of exercise opportunities can impact the constitutional determination); *Ramos v. Lamm*, 639 F.2d 559, 570 (10th Cir. 1980) ("[S]mall cells in which inmates are confined, along with the deteriorating and unsanitary conditions in the main living

retribution,¹¹³ or the aims of the penological system as a whole.¹¹⁴

areas, have a direct detrimental impact on the health and well being of the inmates.”); *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1977) (stating that the prison is “intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental”); *Nelson v. Heyne*, 491 F.2d 352, 355–56 (7th Cir. 1974) (noting that disciplinary beatings in juvenile center result in greater aggression by a child: “[T]he infliction of such severe punishment frustrates correctional and rehabilitative goals . . . and the current sociological trend is toward the elimination of all corporal punishment in all correctional institutions.”); *id.* at 357 (stating that injections of tranquilizers do not serve the interest of “reformation so that upon release from their confinement juveniles may enter free society as well adjusted members”); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (recognizing that whipping of inmates with leather strap is “degrading to the . . . punished It frustrates correctional and rehabilitative goals. . . . Whipping creates other penological problems and makes adjustment to society more difficult”); *Wright*, 387 F.2d at 526 (“[Prison conditions] could only serve to destroy completely the spirit and undermine the sanity of the prisoner.”); *Aikens v. Lash*, 371 F. Supp. 482, 494, 498 (N.D. Ind. 1974) (stating that solitary confinement conditions are “shockingly inhumane and . . . threaten the sanity of the inmate and are abhorrent to any efforts at rehabilitation”); *Battle*, 376 F. Supp. at 424 (holding that solitary confinement for periods up to one year are “cruel and unusual” punishment because prisoner has no opportunities for work, education, or physical exercise); *Holt v. Sarver*, 309 F. Supp. 362, 379–80 (E.D. Ark. 1970) (holding no constitutional right to rehabilitation, but “absence of an affirmative program of training and rehabilitation may have constitutional significance where . . . conditions and practices exist which actually militate against reform and rehabilitation”).

¹¹¹ See *Cunningham v. Jones*, 567 F.2d 653, 659 (6th Cir. 1977) (“The imposition of hunger as punishment would tend equally to make those subjected to it hate their jailors and create more difficulties for the institution and for society.”); *Aikens*, 371 F. Supp. at 494 (suggesting that solitary confinement cells “breed hate and scorn and contempt for prison officials and for the law”); *Holt*, 309 F. Supp. at 379 (“[F]ailure . . . to help [prisoner] become a good citizen will be compounded by the ever present willingness of his fellow inmates to train him to be a worse criminal.”).

¹¹² See *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (emphasizing “hands-off” approach because “[c]ourts must recognize that the authority to make policy choices concerning prisons is not a proper judicial function,” and stating that there is no obligation under the Eighth Amendment beyond providing adequate food, clothing, shelter, sanitation, medical care, and safety); *Ramos*, 639 F.2d at 567 (noting no need to review the concepts on penology pressed by the plaintiffs, though “there may be a point where abuse in these areas would constitute an actual violation of the Eighth Amendment guarantee”).

¹¹³ See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (concluding that harsh conditions are a part of the penalty owed); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989) (arguing that prisoners cannot expect comfortable conditions and only deserve adequate hygiene facilities); *Smith v. Fairman*, 690 F.2d 122, 125–26 (7th Cir. 1982) (finding adequate food, medical care, and “far from perfect” sanitary conditions, but also noting that “[u]ndoubtedly life in a two-man cell . . . is unpleasant and regrettable. But ‘to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.’”); *Capps v. Atiyeh*, 652 F.2d 823, 823 (9th Cir. 1981) (overruling the trial court’s finding, in light of *Rhodes v. Chapman*, that rehabilitation efforts of several

In answer to the latter question, the Court has been clearly willing to make an independent judgment on whether the punishment imposed conflicts with society's justifications for punishment. In *Rhodes v. Chapman*, the Court was faced with an Eighth Amendment challenge to a prison policy of "double celling," which puts two inmates into a single cell measuring sixty-three square feet.¹¹⁵ In holding that such a condition does not constitute the "unnecessary and wanton infliction of pain," Justice Powell found this situation to be more a question of accommodation, rather than a deprivation of basic human needs.¹¹⁶ He concluded: "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."¹¹⁷ In *Estelle v. Gamble*, the Court held that a prisoner's complaint over his lack of medical care did not rise to a constitutional violation because it involved only medical malpractice and not "deliberate indifference."¹¹⁸ But Justice Marshall, realizing there would be a different result with more severe facts, stated: "[D]enial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."¹¹⁹

In contrast, with respect to the death penalty, the Court has begun to step back and essentially allow legislatures, collectively,¹²⁰ to justify the imposition of the death penalty. But in Eighth Amendment claims arising from prison conditions and disciplinary measures, a court cannot automatically defer to the legislature's determination of whether a particular punishment conflicts with society's justifications for punishment. Punishments imposed inside prison walls are not

institutions have been hampered by overcrowding). While other cases speak of rehabilitation in holding inhumane conditions unconstitutional, there is arguably an implicit notion that prisoners in our penal system should not be treated as animals because humans in our society's structure do not deserve such treatment. See *infra* notes 121-28 and accompanying text.

¹¹⁴ See *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) ("[S]ubjecting prisoners to violent attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose."); see also *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (stating that denial of medical care may serve no penological purpose).

¹¹⁵ See 452 U.S. 337, 341 (1981).

¹¹⁶ See *id.* at 348-49 (holding that decreases in job and educational opportunities could not even constitute punishment and that there was "no evidence that double celling . . . is grossly disproportionate to the severity of crimes warranting imprisonment").

¹¹⁷ *Id.* at 347. Justice Powell explicitly acknowledged states strive to achieve "the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." *Id.* at 352. His emphasis on restrictive conditions being proportional to "jailable" offenses fits well into the retributive model.

¹¹⁸ 429 U.S. 97, 108 (1976).

¹¹⁹ *Id.* at 103.

¹²⁰ This is not to be construed as meaning the Court will defer to a single legislature's act in imposing the death penalty. Under the "three-institution" test, the Court weighs the total number of states that have imposed the death penalty in a given situation.

necessarily part of a sentence authorized by the legislature. Thus, courts must independently apply the standard of "unnecessary and wanton infliction of pain": If a prison-imposed punishment conflicts with society's justifications for punishment, it is an "unnecessary and wanton infliction of pain" and thus in violation of the Eighth Amendment.

Finally, this connection—determining the constitutionality of a prison-imposed punishment by deciding whether it conflicts with society's justifications for punishment—cannot be overemphasized because of the implications it has on a larger scale. What an inadequate and absurd penal system we would have if prisoners were sentenced to a term of prison, but spent that period in a low-security institution on the beach with an abundance of freedoms. The same problem would exist if prison officials arbitrarily decided to add twenty years to every prisoner's sentence, or the warden authorized corporal punishment at each roll call. The reality of our penal system demands that our prisons reflect the justifications for punishment as determined by society.

Taking these three areas of Eighth Amendment law together—prison terms, the death penalty, and prison administration—it appears as if society's justifications for punishment serve as the limits—albeit outer limits at times—to what punishments are permissible. While no one penological justification is more favored than the other, Eighth Amendment analysis typically relies on the traditional justifications listed above, weighted according to prevailing penal philosophies.¹²¹

That society's justifications for punishment determine the scope of the Eighth Amendment is consistent with historical trends in Eighth Amendment case law and sentencing schemes. For example, the "hands-off" approach to prison administration, which was the theme for the United States court system up to the 1960s, was a product of society's emphasis on prisons serving an incapacitation function. Although the penitentiary grew up in the 1800s as a way to reform society's offenders through a rigorous program of discipline and constraint, the continuing problem of crime forced society into the "thought that incarceration controlled deviant and dependent populations."¹²² With "the loss of faith in rehabilitation . . . [s]ociety now justified segregating criminals solely for its own

¹²¹ It must be conceded that under this analysis, whether an Eighth Amendment claim is valid depends on what the courts *perceive* to be the current trend in penal philosophy. This is, of course, consistent with the idea that courts use penological justifications as the standard to ascertain society's "evolving standards of decency." Whether courts become too active, injecting their belief system into the search for a penological justification, is a separate issue. Apparently, Justice Scalia believes this to be the situation, explaining his persistence in deferring to legislatures. *See supra* notes 92–99 and accompanying text. So although society's justifications for punishment may change over time, the courts' handling of Eighth Amendment claims shows that sanctions tied to some current penological justification are not violative of the Constitution.

¹²² Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 538 (1994).

protection, thus confirming the outcast status of criminals by abdicating any duty to reclaim them."¹²³ And so with incapacitation as the purpose behind punishment, it makes sense that courts did not step in and determine the constitutionality of prison conditions and policies, so long as prisons provided the bare necessities and did not shock our society's conscience.¹²⁴ However, in the 1960s, courts began to employ a "hands-on" approach to prison administration. Courts "began to inquire into correctional policies and actions of administrators, and to declare them unconstitutional . . ."¹²⁵ This era of judicial activism coincided with the resurgence of rehabilitation as the primary purpose of punishment.¹²⁶

But the public confidence in rehabilitation rapidly declined in the late 1970s.¹²⁷ The end of rehabilitation as a goal of incarceration may have been signaled later by the United States Supreme Court's landmark case of *Rhodes v. Chapman*, where it was held that double-bunked cells, with less than sixty-three square feet of space, did not violate the Eighth Amendment.¹²⁸ This move to the "hands-off" approach was coupled with the rise of determinate sentencing, where the main goal of punishment seemed to be a mix of incapacitation and retribution.¹²⁹ The Federal Sentencing Guidelines, enacted in 1984, listed as one of its main goals to "ensure imprisoned offenders remain incarcerated for the entirety of their terms."¹³⁰ "Generally repudiating rehabilitation as a sentencing rationale, the Act instead endorsed the other conventional rationales

¹²³ *Id.* at 538-39.

¹²⁴ *See id.* at 539 (though reformers proposed alternatives to imprisonment, it was determined that alternatives were not suitable for many prisoners, despite horrendous conditions); McCoy, *supra* note 59, at 226 ("[C]ourts would keep out of prison affairs unless gross misconduct was alleged.").

¹²⁵ McCoy, *supra* note 59, at 226.

¹²⁶ *See id.* at 295; *supra* note 91 (detailing cases in the 1960s and 1970s holding prison conditions or policies unconstitutional because they did not operate to rehabilitate offenders).

¹²⁷ *See id.* at 295 ("[The] public's increasing fear of crime and widespread perceptions that both crime rates and recidivism rates were rising led many to view rehabilitation programs as . . . misguided efforts which simply do not work."); James Q. Wilson, "What Works?" *Revisited: New Findings on Criminal Rehabilitation*, in *THE DILEMMAS OF PUNISHMENT*, *supra* note 59, at 327 ("With few and isolated exceptions, the rehabilitative efforts . . . have had no appreciable effect on recidivism.").

¹²⁸ *See supra* notes 115-17 and accompanying text; *see also* Jack E. Call, *Recent Case Law on Overcrowded Conditions of Confinement*, in *THE DILEMMAS OF PUNISHMENT*, *supra* note 59, at 239-42 (discussing how *Rhodes* was a mandate for lower courts to step away from judicial intervention in prison systems).

¹²⁹ *See generally* ARTHUR W. CAMPBELL, *THE LAW OF SENTENCING* (2d ed. 1991) ("[D]eterminacy . . . carried the promise of . . . lower crime rates, milder offenses, and victim empowerment.") (excerpts on file with author).

¹³⁰ *Id.* (noting that Congress omitted parole system from guidelines).

of...incapacitation and retribution.”¹³¹ This shift in justifications for incarceration explains why courts today are reluctant—again—to interfere with prison officials and their policies. Thus, provided prison provides the basic necessities, courts will not find Eighth Amendment violations; harsh conditions are not unconstitutional in light of society’s justifications for punishment.¹³² Ultimately, then, courts have remained faithful to the lesson of *Trop v. Dulles*: Punishments considered constitutional at an earlier time in our nation’s history may later be found to violate the Eighth Amendment when society’s justifications for punishment change.

This leads to a compelling question, central to the task of passing judgment on right to view statutes: If a punishment must not conflict with society’s justifications for punishment to be constitutional under the Eighth Amendment, is a punishment imposed to address a legitimate governmental interest constitutional? To put it another way, does society recognize a legitimate governmental interest as a justification for punishment? While such an issue may be difficult to answer in the realm of statutory punishments imposed upon conviction,¹³³ it is unlikely that a punishment can be justified by a mere legitimate governmental interest.¹³⁴ This is not to say, though, that no governmental interest can be served by a punishment. Indeed, a properly justified punishment can have additional consequences that benefit the government or even select individuals;¹³⁵ however, the punishment cannot *alone* be justified by

¹³¹ *Id.*

¹³² See *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (finding no deprivation of essential food, care, or sanitation and holding that prisons which “house persons convicted of serious crimes, cannot be free of discomfort”).

¹³³ At least one state’s constitution has required a penological justification for criminal punishment, and many states require the same in their statutes or common law. See *supra* note 60.

¹³⁴ At least one court has reached this conclusion as a matter of law. In a recent case, the Ninth Circuit stated: “It appears that none of the Eighth Amendment cases decided by the Supreme Court, this circuit, or any other court of appeals has upheld a pain-inflicting measure simply because prison officials implemented the policy to ‘address’ a legitimate governmental interest.” *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir. 1993) (holding cross-gender body searches of female inmates are an “unnecessary and wanton infliction of pain”); see also *Gates v. Collier*, 501 F.2d 1291, 1319–20 (5th Cir. 1974) (holding that a shortage of funds is no justification for conditions which deprived inmates of basic elements of hygiene and adequate medical treatment and also provided inadequate protection against physical assault by other inmates); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (holding that a shortage of state funds is no justification for the use of a leather strap for discipline, and that “constitutional requirements are not, in this day, to be measured or limited by dollar considerations”); *Inmates of the Allegheny Cty. Jail v. Wecht*, 699 F. Supp. 1137, 1146–47 (W.D. Pa. 1988), *vacated on other grounds*, 493 U.S. 948 (1989) (requiring, despite grave concerns over funding, construction of a new prison due to overcrowding, deplorable mental health facilities, and lack of climate control at old facility, which could not be remedied by renovation).

¹³⁵ As several commentators have suggested, the notion of victim “satisfaction” can be a

that governmental or individual interest—it is still subject to the limitations imposed by those justifications for punishment traditionally recognized by society.¹³⁶

legitimate consequence of punishment. For example, there are traditionally two kinds of satisfaction achieved through utilitarian punishment. First, there is material compensation to the victim, intended to “do away with the bad consequences of the offense which have affected him.” PRIMORATZ, *supra* note 18, at 21. Primoratz points out that such a material compensation is only applicable in some cases, such as theft or embezzlement. The second type of satisfaction is vindictive. Primoratz explains that evil inflicted on the offender can be a source of satisfaction for the victim and society as a whole, because the offense itself illicit feelings of rage and displeasure. *See id.* at 22. Robert Gerstein takes a similar position in arguing that while retributivism focuses on the deserved response of the community to an offender, there are good arguments for including personal vengeance as a rationale in any system of just laws. *See* Robert S. Gerstein, *Capital Punishment—“Cruel and Unusual”? A Retributivist Response*, 85 ETHICS 75, 76 (1975).

In fact, one commentator has argued that the rationale of individual vengeance, rather than the notion of social retribution, is a more justified form of punishment. *See* Paul Boudreaux, *Individual Vengeance Rationale*, J. CRIM. L. & CRIMINOLOGY 176, 184 (1989). Boudreaux defined individual vengeance as the “desire to punish a criminal because the individual gains satisfaction from seeing or knowing that the person receives punishment.” *Id.* at 184. But Boudreaux recognized that individual vengeance could only partly justify a punishment. *See id.* at 188–89 (“[Vengeance] may . . . rationally justify criminal punishment *partly* on the aggregated desire of individuals in the society to see that a person who has broken its laws receives punishment.”) (emphasis added). Even assuming that “aggregated” desire does not preclude justifying punishment on behalf of only a select few individuals such as a murder victim’s family, Boudreaux’s theory is indicative of the flawed approach taken by many defenders of “revenge” punishments. Indeed, individual vengeance is properly classified as utilitarian. *See id.* at 184. That a punishment can generate “satisfaction,” thus satisfying utilitarian principles, is not the end of the matter. The satisfaction derived is only justified *to the extent of the appropriate limits* on punishments. And there are two fundamental limits on utilitarian punishments: punishments that are too expensive and punishments that are inefficacious. *See* JEREMY BENTHAM, *THE THEORY OF LEGISLATION* (1931), *reprinted in* CRIMINAL LAW, *supra* note 60, at 39. With the first limit, the evils produced by utilizing such a rationale must be weighed against the benefits. The second limit prevents inflicting a punishment which will have no effect upon the will of the offender. And while the satisfaction of vengeance can also be an appropriate result of retributive punishment (as Gerstein proposed), the principles of “just deserts” must be met. *See infra* notes 142–57 and accompanying text. Either way, it is not justifiable to inflict greater punishment than what is necessary for retributive or utilitarian reasons, even in an effort to obtain “satisfaction.” Boudreaux seemingly did recognize the need for limits on individual vengeance, stating that his theory “smacks of lawlessness and vigilantism.” Boudreaux, *supra*, at 188; *see also infra* note 161 (discussing lack of recognizable limits on revenge punishments). But his article does not directly address this limit analysis; similar to the proponents of right to view statutes, Boudreaux actually ties his theory to the victims’ rights movement. *See* Boudreaux, *supra*, at 189–90.

¹³⁶ *See* PRIMORATZ, *supra* note 18, at 22 (“[Societal benefits from punishment refer] only to such modifications of punishment which do not aggravate it, over and above what is needed for reasons of prevention, general and particular; no penalty is to be meted out or made more severe for the purpose of satisfying the pleasure of vengeance.”); MICHAEL MOORE, *LAW*

V. RIGHT TO VIEW STATUTES AND THE EIGHTH AMENDMENT

Permitting family members of the victim to view executions is, in application, a unique form of punishment. The punishment is not exactly imposed in the traditional way, with the legislature passing a criminal statute with penalties described, and a court of law imposing the exact sentence upon conviction. While legislatures have passed right to view statutes in connection with the procedures for execution, no jury or judge considers whether this punishment is appropriate for each defendant.¹³⁷ On the other hand, permitting the viewing of an execution is not exactly a routine prison measure undertaken in the due administration of a penal system.

A court determining the constitutionality of a right to view statute should approach its analysis from the fact that this punishment is, in effect, imposed by the prison system.¹³⁸ Although it is imposed in the context of the death penalty, the "three-institution" test is not applicable because juries play no role in deciding whether a prisoner's execution will be viewed by the victim's family. Rather, as an intuitive matter, the process whereby family members of the victim can view executions is connected to the *carrying out* of the death penalty imposed at trial. Imposing this punishment is similar to the notion that to "the extent that . . . [prison] conditions are restrictive and even harsh, they are part of the

AND PSYCHIATRY (1984), *reprinted in* CRIMINAL LAW, *supra* note 60, at 73–74 (describing utilitarian philosophy of achieving social gains from imposing punishment, limited by the retributive idea of what the offender deserves).

¹³⁷ This Note does not propose that right to view statutes are bills of attainder. While bills of attainder do outlaw legislative punishments, *see* U.S. CONST. art. I, § 9, cl. 3, a prisoner on death row has actually been convicted in the constitutionally proper way. Whether due process rights are implicated upon a punishment being added to a sentence without a judicial decree is a more difficult question. The courts have essentially stated that punishments imposed in the process of incarceration are not improper so long as they are consistent with the nature of a sentence, i.e., part of the sentence. *See supra* notes 109–14. Arguably, if the provision allowing the victim's family to view the execution is in place at the time of sentencing, then right to view statutes could be part of the capital sentence imposed after conviction.

¹³⁸ Of course, if the Court were to analyze the constitutionality of right to view statutes from the premise that they are part of the sentence imposed by the trial court, most likely the "three-institution test" would be employed. It is difficult to figure where the Court would come out on this. First, while several states have enacted right to view statutes in the past four years, it is far from the sweeping consensus that existed in prior death penalty cases. *See supra* notes 9 and 11 (indicating that 14 states explicitly permit the victim's family to view the execution). Secondly, and perhaps more importantly, juries are not involved in the determination of what family members will be entitled to view the execution. Though the Court has not heavily relied on such data, it still may play a role, especially where the legislative mandate is not clear. As for members of the Court, it is clear that there is a split. *See supra* notes 92–99 and accompanying text. It is important to note here that there is no majority approach to evaluating justifications for imposing the death penalty in a given situation. Therefore, the analysis in Part IV.B of this Note is still pertinent to the "three-institution" test.

penalty that criminal offenders pay for their offenses against society.”¹³⁹ This conclusion is supported by the fact that this punishment is not imposed by a court during sentencing, when it makes a determination of the prisoner’s culpability and the nature of the harm caused by his or her offense. Thus, courts should take an active role in deciding whether the punishment of allowing family members of the victim to view the execution is to be upheld on an Eighth Amendment challenge.¹⁴⁰ In any event, no matter how much deference is given to the legislature, the fundamental issue to resolve should be, in the context of the death penalty, whether the right to view executions conflicts with the principles of retribution—society’s oldest and only possible justification for such punishment.¹⁴¹

¹³⁹ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹⁴⁰ In reality, the likelihood of a death row inmate challenging the constitutionality of a state’s right to view statute may be small. This may be due to several factors, including indifference on the part of the inmate and preoccupation with the appeals process for the execution itself. However, based on a different view of the Eighth Amendment, the likelihood of a challenge may be greater. Steven Blum proposed that the prohibition on “cruel and unusual” punishments was not just an individual right, but also the entire society’s right to be free from governments who attempt to assert authority through terror—tyrannies, fascists, and totalitarian regimes. *See* Blum, *supra* note 6, at 426–30. Blum states: “Under any reasonable interpretation of our common history and Constitution, totalitarianism and human degradation are two undesirable characteristics of political and social life The Clause . . . protect[s] the workings of a democracy based on rational discourse and human dignity; and to keep society from degrading, debasing, and brutalizing itself.” *Id.* at 437–38. Under such a theory, it is possible to allow a third party citizen to “refuse to consent to the form of government that is the punisher . . . and to protect her rights as a citizen entitled to live in a society [with] a Constitution that establishes principles of humane and rational governance.” *Id.* at 452–53. Such a proposition would all but eliminate the question of standing, allowing any opponent or advocate of the death penalty to challenge right to view statutes. Consistent with his theory, Blum also argues that prisoners cannot consent to “cruel and unusual” punishment. *See id.* at 451.

¹⁴¹ *See* Martin, *supra* note 57, at 109. It is arguably unanimous among scholars and judges that the only penological justifications for a sentence of death is retribution and deterrence. Thorsten Sellin wrote: “[T]here are only two purposes of the death penalty that are worthy of attention, for the fate of this punishment hangs on them alone.” Thorsten Sellin, *Capital Punishment*, in *VOICES AGAINST DEATH* 229 (Philip E. Mackey ed., 1976).

The death penalty has indeed been justified as a general deterrent. The idea behind general deterrence is that potential offenders will be deterred from violating the law when they see the punishment imposed on others. *See* VON HIRSCH, *supra* note 60, at 38–39; PRIMORATZ, *supra* note 18, at 20–22 (“General prevention ought to be the chief end of punishment, as it is its real justification.”). But in light of the doubt that surrounds the deterrent effect of the death penalty itself, *see* NATHANSON, *supra* note 60, at 17–20; VON HIRSCH, *supra* note 60, at 39 n.7, it seems rather unlikely that the punishment imposed by right to view statutes will deter anyone from killing. *See* Nicholson, *supra* note 1, at 1120 (noting that Texas’s post-sentence victim allocation does not perform any general deterrent functions). If the thought of the death penalty even enters the mind of a potential killer, it is reasonable to believe that the consideration of losing one’s life (possibly including the method of execution) will outweigh the consideration

Retribution is the oldest justification for punishing wrong-doers.¹⁴² Its baseline is to look back upon the offense committed by the wrong-doer; punishment, then, is imposed because that person deserves it and not because it is necessarily useful to society.¹⁴³ The punishment imposed is typically proportional to both the offender's culpability and the harm caused by the offense. Generally speaking, then, a death row inmate could theoretically be subjected to the punishment of having the execution viewed by the victim's family because that prisoner deserves it. But there are many rationales for retributive punishment, and each must be looked at separately before reaching such a conclusion.

In its most raw form, retribution imposes on the wrong-doer a punishment in the exact form of the offense.¹⁴⁴ In such an "eye for an eye" system, a rapist would be raped, a thief would be stolen from, and a murderer would be killed. But such a proposition is unworkable for several reasons, but most importantly because of the absolutely inhumane and harsh nature of such a penal system.¹⁴⁵

of who may watch. It is just not practicable to assume a potential killer will not kill because if he does, his execution will be watched by his victim's family.

Lynne Henderson, discussing the justification for victim impact statements at sentencing, reached a similar conclusion by emphasizing the need for community education for deterrence to be effective:

For general deterrence purposes, the participation of the individual victim seems to be of negligible value in determining sentences because this theory concentrates on the moral beliefs and behaviors of the community. It holds that the imposition of the criminal sanction deters crime, regardless of who the victim is. The focus of general deterrence is public and nonindividualized; victim participation is not necessary to educate the community.

Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 988-89 (1985).

Finally, for obvious reasons, no justification for the death penalty can rely on three other forms of utilitarian punishment: incapacitation, rehabilitation, or specific deterrence. Based on the theory of this Note, one would conclude that these justifications are likewise irrelevant to an analysis of the punishment imposed by allowing victims' families to view the executions. The finality of the death penalty confirms this conclusion.

¹⁴² See *Exodus* 21:24 ("And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth.").

¹⁴³ See PRIMORATZ, *supra* note 18, at 70. Some argue that principles of retribution and utilitarianism co-exist in punishment. See MOORE, *supra* note 136, at 73.

¹⁴⁴ "The principle of equality of punishment and crime, called 'lex talionis' by Kant, is the only [punishment] [sic] that 'can definitely assign both the quality and the quantity of a just penalty.'" CLAUDIO MARCELLO TAMBURRINI, *CRIME AND PUNISHMENT?* 87 (1993). However, even Tamburrini recognized that Kant realized the limits of such an application, arguing that Kant's theory is more similar to equivalence, and not equality. See *id.*

¹⁴⁵ Though the contours of the Eighth Amendment are not always clear, "cruel and unusual" punishment definitely includes those punishments considered barbaric and inhumane at the time of the writing of the Constitution. See Gardner, *supra* note 41, at 98. Thus, a prisoner responsible for a gruesome murder could not constitutionally be executed in like fashion.

Even proponents of retributive justice realize such a method for meting out punishment cannot work,¹⁴⁶ and no one could support such a system in a civilized country like the United States.¹⁴⁷ Therefore, the justification for right to view statutes cannot rest on the notion that because the prisoner witnessed the death of the victim, the prisoner must be deprived of any right to privacy at death.

However, the "eye for an eye" justification need not be understood literally; it can be used to justify a punishment that is comparable to the offense committed, in that the "punishment should affect the offender as much as his offense has affected the victim."¹⁴⁸ The advantages of such a system are two-fold: it avoids the barbaric nature of "an eye for an eye" and creates a proportionality scheme that guarantees each offender gets his "just deserts." To explain the rationale mathematically, suppose the taking of another's life is a deprivation value of X, and the debasing nature of the victim's moment of death is a deprivation value of Y. Retributivists could argue that the execution itself is the punishment proportionately matched with the murder X, and the victim's family viewing the execution is matched with the nature of the victim's moment of death, Y. We could then say that the severity of the punishment is proportional to the severity of the crime, consistent with the principles of retribution. While proportionality concepts may at first appear to justify the victim's family viewing an execution, the realities of death row refute such a conclusion. A prisoner's experience on death row is a continuous struggle to maintain sanity, and the spiritual and psychological torture of knowing your exact moment and means of death may be unparalleled.¹⁴⁹ Therefore, the pain and agony experienced on death row, a

¹⁴⁶ See NATHANSON, *supra* note 60, at 74, 103 (showing impracticality of "eye for an eye" by posing question of what society should do with airline hijackers, spies, and air polluters); PRIMORATZ, *supra* note 18, at 80; TAMBURRINI, *supra* note 144, at 109. However, Tamburrini argues that *lex talionis* may still have some application in the area of property crimes (i.e., theft), in that paying for any damages caused, including restitution, could constitute "just deserts." See *id.*

¹⁴⁷ See generally *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (noting that "eye for an eye" was an ancient way of imposing punishment); *Caldwell v. Mississippi*, 472 U.S. 320, 324 (1985) (emphasizing that "eye for an eye" is not used in modern punishment).

¹⁴⁸ PRIMORATZ, *supra* note 18, at 80-81. Primoratz goes on to explain that in the "universal property of injuries," the value of the harm inflicted and the offender's deprivation of a right should be equal. *Id.* at 80; see also TAMBURRINI, *supra* note 144, at 112-14 ("[V]iolating the rights of a victim demands restricting an equivalent right, though not necessarily the same one, of the offender. The amount of the deprivation imposed on the victim and the offender, and not its kind, must be equal."); *id.* at 114 (stating that ranking of offenses according to seriousness and of punishments according to severity can create a proportional system that avoids the problem of harshness).

¹⁴⁹ Watt Espy argued this very point in his essay on death row inmates and the experience of anticipating the execution:

Only one who has endured the experience can fully understand the thoughts and emotions of a person who has been condemned to die at the hands of the executioner. Such

deprivation valued at Z, would already tip the proportional scales to a weightier punishment as compared with the nature of the victim's indignity at death—provided Z is at least equal to or greater than Y. In other words, the value of the prisoner's deprivations at least equals the deprivations suffered by the victim *prior to* imposing the punishment that right to view statutes authorize.

Under yet another application of retributivism, the idea of the social contract decides which punishments are permissible. In this theory, each person assumes the benefits of a legal system, while prepared to accept the burden of obeying the laws even when he or she has no desire to do so.¹⁵⁰ When a wrong or offense is committed, an imbalance is created in that the offender has gained the benefit of not following the law, while still enjoying the benefit of society's legal system and respect for his or her rights.¹⁵¹ Punishment of the offender is justified, then, because "if the system is to remain just, it is important to guarantee that those who disobey will not thereby gain an unfair advantage over those who obey voluntarily."¹⁵² The idea behind punishment is to maintain a proper balance between benefits and burdens; in punishing the offender, we impose a burden to

an individual is kept in close confinement, deprived of all the creature comforts of life, forced to contemplate a sudden and violent death by a means already ordained and known to him or her. It is a period during which the soul and spirit of any mortal is severely tested.

Espy, *supra* note 43, at 27. Espy also described the inherent cruelty in treating the condemned in such a manner, and under any definition or theory, such conditions surely constitute a "punishment" in addition to the execution itself. In explaining that the death row inmate often suffers a more agonizing anticipation of death than his or her victim did, he stated:

[D]eath itself is probably a merciful release from the agony and torment that they have suffered during their long period of confinement. No individual murderer confines the victim to restricted quarters over a sustained period of time . . . [which the victim] knows the manner in which death will come and the time at which it will arrive, hoping against hope for the magical reprieve, stay, or commutation that might prolong his life.

Id. at 36.

¹⁵⁰ See Gerstein, *supra* note 135, at 76. See generally JOHN STUART MILL, ON LIBERTY AND LIBERALISM (Gertrude Himmelfarb ed. 1984) (discussing the idea of the free and sovereign individual in relation to society and fellow citizens). For an interesting discussion on the problems with such a theory in relation to the socio-economics of those who commit crime, see Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973), reprinted in CRIMINAL LAW, *supra* note 60, at 76 ("But to think [the social contract theory] applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. [T]hey certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience.").

¹⁵¹ See HERBERT MORRIS, ON GUILT AND INNOCENCE 33–34 (1976).

¹⁵² Gerstein, *supra* note 135, at 76.

eliminate the advantage over society.¹⁵³ In essence, the offender owes society a debt, a payment for the unfair advantage he or she received.

From a social contract point of view, because society values the dignity of death and its laws are meant to protect that individual right, a death row inmate should owe the dignity of his death to society. Through right to view statutes, we are restoring the balance in society that recognizes each person's right to a dignified death. This punishment will ensure that there is not a decrease in the dignity surrounding death as a result of the prisoner's crime.

While perhaps the most defensible position for right to view statutes, the above reasoning misses the underlying rationale of retributive punishment. When we impose punishment to restore the balance in society, we presuppose the desire to uphold the right of the law.¹⁵⁴ We also presuppose a civilized society, in which members of the society are treated with dignity by the legal system. When we degrade those in society who have transgressed the law, in the name of a debt, we contradict these notions. How can we assume that allowing a victim's family to view an execution will restore the right of law? Nothing in viewing the execution will restore justice because an inevitable result of witnessing the state's taking of a life is to cheapen the value that such a witness puts on the dignity of death.¹⁵⁵

¹⁵³ See *id.* at 76. On the other hand, "any unduly severe punishment would unbalance things in the other direction." *Id.* at 77; see also TAMBURRINI, *supra* note 144, at 121-23 (arguing that crime must be followed by punishment so that the crime is annulled, i.e., revalidating the law that was broken so as to ensure its respect and the applicability of it to the offender).

¹⁵⁴ See TAMBURRINI, *supra* note 144, at 122. Gerstein stated:

Because punishment is justified as the deserved response of the community to a member who has acted unjustly, it is essential that the punishment meted out to him be consistent with his position as a member of the community. . . . The purpose of punishment is to restore the balance of justice within the community, not further derange it.

Gerstein, *supra* note 135, at 77.

¹⁵⁵ Many commentators have reached this conclusion in arguing against the imposition of the death penalty in America. Steven Blum explains:

[E]xposure to death deadens emotion . . . making us more willing to accept death as a matter of course, replacing outrage with a soothing banality. Social scientists have concluded that public execution brutalizes the community, especially if conducted locally. Instead of instilling respect for life, it prompts disrespect; instead of creating a fear of violence, it promotes a fascination with it.

Blum, *supra* note 6, at 436. Blum does point out that the definition of public execution does not encompass the need for public accountability (i.e., official witnesses to the execution), but does include those witnesses who desire to see the prisoner killed. See *id.* at 415 n.8. Under such a definition, members of the victim's family attending an execution would constitute a public execution. See generally BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY 4-6 ("[Compassion will] soon lose its

Under true retributive theory, the condemned remains a member of the community, not to be "toyed with and discarded."¹⁵⁶ As Robert Gerstein explained, "an affliction which undermines a man's self-respect rather than awakening his conscience, which impairs his capacity for justice rather than stimulating it, could not serve as just punishment."¹⁵⁷ A civilized society must use punishment as a reaffirmation of its value system, not an opportunity to further degrade it.

Although the punishment cannot be justified as a response by the society as a whole, is it possible to justify the punishment as revenge for the victim's family? While some early scholars believed that revenge was the real motivation behind society punishing its offenders,¹⁵⁸ the modern trend among criminal law scholars is to declare revenge bad policy.¹⁵⁹ Revenge differs from retribution in very key respects. Retribution is punishment "'carried out through a general will and in its name,' so that it executes justice 'freed from subjective interest and a subjective form . . .'"¹⁶⁰ Thus, punishment imposed to satisfy a desire for vengeance is susceptible of few limits,¹⁶¹ and emphasizes only individual injury rather than the

place in the human breast. Misery of every kind will then be contemplated without emotion or sympathy. . . . [And] what is worse than all, when the centennial of our moral faculty is removed, there is nothing to guard the mind from the inroads of every positive vice.").

¹⁵⁶ *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (arguing that the death penalty should be completely banned).

¹⁵⁷ Gerstein, *supra* note 135, at 78.

¹⁵⁸ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 45 (1935) (arguing that retribution is "vengeance in disguise").

¹⁵⁹ See Henderson, *supra* note 141, at 994 ("Despite its popularity among victim's right proponents, retaliation has received relatively little support from philosophers or social scientists.").

¹⁶⁰ PRIMORATZ, *supra* note 18, at 71. Primoratz also argues, consistent with the theme of this Note, that once an "institution of punishment has been set up, revenge is no longer necessary or admissible." *Id.* at 71.

¹⁶¹ See NATHANSON, *supra* note 60, at 109–10. Nathanson argues that the intense hatred society has for murderers can easily spread to other groups who have not committed offenses against society. Therefore, if the motivation behind punishment is society's need for satisfying its revenge, there is no logical reason why that punishment cannot be imposed unjustly or arbitrarily on others. *But see* Gerstein, *supra* note 135, at 76 ("Retributivism is not the idea that it is good to have and satisfy [the] emotion [of revenge]. It is rather the view that there are good arguments for including that kernel of rationality . . . found in the passion for vengeance as a part of any just system of laws.").

However, even assuming revenge can justify retributive punishments, it does not follow then that the victims decide the nature of the punishment or carry out the punishment. Rather, the idea should be that our penal system ensures that its punishments, to some extent, are perceived as exacting repayment for the injury caused to a member of society. Nathanson discusses the concern that whether legitimate or not, the desire for revenge must be satisfied to avoid a state of vigilante justice, uncontrollable and dangerous. By including that sense of revenge in society's retributive punishment, this desire would be satisfied. Although public confidence in justice is critical, Nathanson believes that particular justification for retribution is

injury caused by a greater moral or legal wrong. Its only concern, then, is returning the pain of injuries that are felt by a select few. There is no reason the inflicted punishment must be proportional, for often those injured by a crime believe their injuries are far worse than they really are.¹⁶² And there is no reason, theoretically, why the inflicted punishment must be for a wrong condemned by society or our penal system.¹⁶³ For these reasons, it is logical to believe retributive punishment must be chosen and inflicted only by an authorized institution.¹⁶⁴ Without such a system, "instead of a reaffirmation of justice, which would lead to reconciliation, a chain of injuries and counterinjuries may be set in motion, a chain which can be endless."¹⁶⁵

flawed because "punishments need not be as severe as everyone wishes in order for them to gain social acceptance." NATHANSON, *supra* note 60, at 111-12 (explaining how, in the context of the death penalty, most people would not believe a life sentence for murder is "getting off lightly," thus not causing a breakdown in the social order). Nathanson goes on to explain that historical data actually shows the opposite trend. In the 1890s, there were over 1,200 executions, yet over 1,500 lynchings. *See id.* at 112. Into the 1900s, executions and lynchings both declined dramatically, and in the 1950s—when executions declined further—lynchings became almost non-existent. *See id.* at 112. Interestingly enough, Nathanson cites the "centralization of legal authority and the shift of authority to execute from local to state officials" as the force that eradicated lynchings. *Id.* at 112. *But see* WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* 26 (2d ed., 1986) ("[R]etributive punishment is needed . . . to suppress acts of private vengeance.").

¹⁶² *See* TAMBURRINI, *supra* note 144, at 89 ("[Victims] would probably leave aside proportionality requirements between the original wrong and the response to it: victims will often overestimate the amount of harm they have suffered.").

¹⁶³ *See* NATHANSON, *supra* note 60, at 110. Nathanson uses the extreme example of a city's basketball team that plays horribly in a tournament. Certainly, the residents of that city may be angry and injured by the embarrassment, and they may feel the need for exacting a similar injury on the team, despite the fact that the team has done no moral or legal wrong. *See id.* at 110.

¹⁶⁴ *See* TAMBURRINI, *supra* note 144, at 89 ("[P]rivate and personal enforcement of one's rights . . . need[] to be restrained."); *see also* KLEINIG, *supra* note 18, at 41-42. Kleinig discusses the ancient Hebrew system where punishment for murder was inflicted by the deceased's next of kin. He notes that cities of refuge were formed to protect those who accidentally killed their victims from the wrath of the victim's family. Kleinig concludes:

The need for impartiality and competence to judge . . . helps us to understand why we generally think that punishment ought to be taken out of the hands of private individuals, and placed in the hands of some impersonal body or authority. . . . [Only punishment] specifying that it is an activity of some responsible agent or agency, whereby it deliberately acts to impose on a moral agent because it believes that agent to have committed some wrong, can be said to be conceptually necessary

Id. at 41-42 (emphasis omitted).

¹⁶⁵ PRIMORATZ, *supra* note 18, at 71. As explained in hornbook-law fashion: "Finally, the retribution or 'just deserts' theory, precisely because it 'operates from a consensus model of society where the community . . . is acting in the right' and 'the criminal is acting in the wrong,'

In fact, it seems as if state legislatures, under the guise of the victims' rights movement, have endorsed a private form of vengeance to be inflicted on those who kill.¹⁶⁶ Relatives of the victim often speak of their need to view the execution so it can constitute the final chapter in their nightmare.¹⁶⁷ They believe their witnessing the execution is the necessary "stamp" to ensure the legal system has worked proper justice. While the victim's family may be a part of the larger society that approves of and imposes punishment, they can not stand in the "shoes" of a society that restores justice by condemning the offense and balancing the burdens and benefits of all societal members. Their motivation is not the same as the penal system's motivation. While the penal system wants to ensure the criminal gets his "just deserts" for violating the law and moral standards that define our community, the victim's family wants revenge only for its injury. In reality, the practice of allowing a victim's family to view the execution has only satisfied the thirst for revenge, and there is no reaffirmation of our community's sense of justice; if anything, witnessing the execution distorts the "repair" of societal values that retribution is supposed to accomplish.¹⁶⁸ And although

had appeal because it seemed to reaffirm our moral values at a time when they were under frequent attack." P. BEAN, PUNISHMENT 17 (1981), reprinted in LAFAYETTE, *supra* note 161, at 29.

¹⁶⁶ With respect to the purpose of post-sentence victim allocation in Texas, where victims' families can confront the prisoners in the courtroom after the death sentence is imposed, one commentator stated that it "gives the victim an opportunity to obtain a form of personal vengeance." Nicholson, *supra* note 1, at 1132; see also Pressley, *supra* note 12, at A3 (discussing the death penalty itself: "There doesn't seem to be the need to protect society to have the death penalty—prisons can do that. One of the remaining justifications is vengeance, almost like something for the family of the victim, or the victims themselves in a way.") (emphasis added).

¹⁶⁷ Brooks Douglass, an Oklahoma state legislator, expressed his need for closure after two men killed his parents over nine years ago: "No one should have to spend their life dealing with something that happened when they were 16 years old. . . . When Stephen Hatch is executed, I know the door to that part of my life will be closed." Romano, *supra* note 6, at A1; see also Brooks Douglass, *Why I Want to Watch a Killer Die*, USA TODAY, Apr. 15, 1996, at 19A ("[I want] closure on an era of my life into which I never chose to enter. Closure of years of anger and hate."). Linda Kelly, the mother of two children who were brutally murdered in Texas, stated: "I'm glad it's over and I'm glad it's done, and I'm glad he's off this earth. I have peace at heart. . . . It is a chapter closed for us . . . I don't have the weight that I had when I went in there." Pressley, *supra* note 12, at A3; see also Lee Hancock, *Victims' Relatives Watch Execution in First for Texas*, DALLAS MORNING NEWS, Feb. 10, 1996, at 1A ("Other people have witnessed executions, and they find it's like a closure. It has to help."); Nicholson, *supra* note 1, at 1134 ("[A] possible psychological benefit for victims is that post-sentence victim allocation provides victims with a sense of closure following the traumatic experiences of the crime itself.").

¹⁶⁸ "I was angry. I was angry at him when he died. . . . I don't want remorse. I'm sorry just doesn't get it. . . . The best thing he could do for me and my family is to go through with this, to die." Hancock, *supra* note 167, at 1A (reporting the comments of Linda Kelly after witnessing the execution of Leo Jenkins, who murdered Linda's two children). Apparently, as Linda Kelly addressed the media after the execution, she "grew angry as she described her

society may feel that the injury caused to the victim's family must be accounted for, it does not follow that the victim's family must become the instrument of punishment. Even if one subscribes to the theory that some vengeance should be built into any penal system,¹⁶⁹ the act of punishment must still be the "deserved response of the community to a member who has acted unjustly . . ." ¹⁷⁰

The fact that the state has authorized the victim's family members to attend executions does not remove the punishment from the realm of private vengeance. The state is merely facilitating the vengeance, and it is not immune from the abuses that have concerned so many criminal law experts.¹⁷¹ Attempting to

feelings." *Id.* at A1. Linda also believed that Leo Jenkins was killed with too much dignity, in contrast to the way her children were killed. *See id.* at A3.

Other recent events more than support this contention. In 1994, after a Houston jury imposed the death sentence on two men, the father of one of the victims said "I wish that these guys could get executed the way [our daughters] did and be left out there—just left there on the ground to die." *Angry Dads Lash Out at Killers of Daughters*, ROCKY MOUNTAIN NEWS, Oct. 12, 1994, at 36A. Elizabeth Harvey, one of the first relatives to view an execution under Louisiana's right to view statute, stated: "[The prisoner's] death was not near what my daughter went through. He had his last meal, his friends all around." Jennifer Liebrum, *Group Pushes Right to View Execution*, HOUS. CHRON., Oct. 15, 1994, at 29. At a meeting of the New Orleans Chapter of Parents of Murdered Children, a man stated: "I got to witness the son of a b— fry who killed our daughter. The chair is too quick. I hope he's burning in hell." Helen Prejean, *Crime Victims on the Anvil of Pain*, ST. PETERSBURG TIMES, May 15, 1988, at 1D. Finally, upon hearing of the murder of Jeffrey Dahmer in prison, Janie Hagen, whose brother was one of Dahmer's victims, decided to send a thank you to the culprit. She stated: "I'd like to know him and get to talk to him . . . He's my hero." Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Dahmer Victims' Families*, CHI. SUN-TIMES, Nov. 29, 1994, at 6.

¹⁶⁹ *See supra* notes 135 and 161.

¹⁷⁰ Gerstein, *supra* note 135, at 77. I am not suggesting here that, to rectify the problem of right to view statutes being private revenge, executions should then become open to the public. Putting aside the Eighth Amendment problems that would likely occur with public executions, *see* Blum, *supra* note 6, there must still be an analysis of what the prisoner actually deserves. The death penalty itself, for example, has been imposed only as a deserved response of the community in that the neutrality of the judicial process, which represents all of society, has reached this conclusion. Separating the family's motivations from the instruments of punishment allows a reasoned analysis that appropriately fits the principles of retribution.

¹⁷¹ "I wanted to take [the victim's] picture and hold it up. I wanted Mark and Kara to be the last things he saw on earth, but they wouldn't allow me to do that." Hancock, *supra* note 167, at 1A (comments of Linda Kelly). Michael Goodwin, in his article on this very topic, correctly warns that states could "increase the victim's participation in the punishment of their offenders ad infinitum. States could allow a victim's family to choose the method of execution, or even administer the actual execution . . ." Goodwin, *supra* note 6, at 601. Goodwin's warning has even resounded with a state legislator who declared that "the next thing they'll want to do is pull the switch." Peter Baker, *Virginia Bill Would Let Victims' Relatives View Executions*, WASH. POST, Mar. 1, 1994, at B1. Steve Hall, an attorney for death row inmates, stated the idea of victims' families viewing executions is "ripe for problems." Liebrum, *supra* note 168, at 29.

Brooks Douglass, the Oklahoma state legislator whose parents were killed, explained his

maintain the limits of authorized vengeance is not a business for which prison officials and legislatures are equipped; ensuring that justice is served for society *as a whole*, and not for private parties, should be their focus.

Without revenge constituting a justified form of retribution, the victim's family's need for closure cannot be relied upon to justify the punishment of viewing the execution. What remains, then, is only the government's interest in providing aid to victims of violent crime. But no court appears to have upheld—and should not today—a prison-imposed punishment because it serves a legitimate goal of the government.¹⁷²

desire for revenge when he stated: "I was walking out one door of the courtroom and they brought him out right in front of me . . . There was a sheriff's deputy standing right next to me and his gun was right by my hand, and I stood there and thought about reaching for that gun." Romano, *supra* note 6, at 19A.

Jimmy Dunne, head of the Death Penalty Education Center, expressed his opposition to the idea of the victim's family members getting personal revenge. "I would not want the victims' family to be there if they are just going to gloat over the execution . . . That would just bring the execution down to a lower level to have someone there cheering a man's homicide." Liebrum, *supra* note 168, at 29.

Finally, it is worth noting that we may not be so far away from the era of lynch mobs. When the Kelly family walked into the execution chamber, supporters outside cheered loudly. See Hancock, *supra* note 167, at A1. After a post-sentence victim allocation statement in a Texas capital murder case, a shouting and shoving match between families of the victim and convicted erupted in the hallway. See *Angry Dads Lash Out At Killers of Daughters*, *supra* note 168, at 36A; see also Goodwin, *supra* note 6, at 606 (reporting that, because of "emotional intensity" at execution, there is an increased risk of a violent confrontation between the prisoner's and the victim's families). After the execution of a South Carolina prisoner, a huge crowd gathered outside the death house to cheer the executioner. See *South Carolina Marks Its First Execution in Over Two Decades*, L.A. DAILY J., Jan. 14, 1985, at 3. "Waiting at the penitentiary gates for the appearance of the hearse bearing . . . [the prisoner's] remains, one demonstrator started yelling, 'Where's the beef?'" *Id.* at 20.

¹⁷² See *supra* notes 133–36 and accompanying text. Even assuming that a legitimate governmental interest was a sufficient justification for punishment, there is strong evidence that viewing executions does not provide the closure needed. See Henderson, *supra* note 141, at 996 ("[V]engeance as a formalized manifestation of anger is of questionable psychological value to the victim."). Henderson goes on to state:

Emphasizing individual vengeance and blame can undermine, rather than facilitate, recovery from a violent crime. . . . [T]o say to a victim that after sentencing he or she can now put the experience to rest denies that any remaining questions of meaning, fears of death, or feelings of helplessness exist. While the sentencing may signal the end of public concern with the crime, it surely cannot be expected to signal the end of the victim's recovery process.

Id. at 998–99; see also Nicholson, *supra* note 1, at 1134 (arguing that the benefit of addressing convicted criminals after sentencing is debatable); Leyla Kokmen & Janan Hanna, *Executions Become More Public: Officers in '77 Case Will Watch Killer Die*, CHI. TRIB., Nov. 21, 1995, § 2, at 1 ("We're talking about revenge, and it's not clear to me that revenge changes one's long-term ability to deal with loss."); *Only Poetic Justice*, ARIZ. REPUBLIC, Nov. 30, 1994, at

VI. CONCLUSION

The viewing of an execution by the victim's family deprives the prisoner of dignity at his or her death, and thus constitutes a controversial form of punishment. Although much of society focuses on advocating or protesting the death penalty itself, it is likely that in the near future right to view statutes may be challenged as "cruel and unusual" punishment.

While recognizing the broad language and changing approaches in courts' Eighth Amendment jurisprudence, a universal theme can be identified: In the variety of contexts in which there have been claims of "cruel and unusual" punishment, the courts have determined whether the punishment imposed conflicts with society's justifications for punishment. Indeed, where they have looked for those justifications depends on the nature of the claim. At times, there is deference to the legislatures; in other situations, the courts have looked into the effects of the punishment themselves. But in either situation, "cruel and unusual" punishment has been defined by relying on society's ever-changing perception of what are the appropriate and permissible aims of criminal punishment.

Allowing the victim's family to view an execution conflicts with society's long-standing belief in the principles behind retributive punishment. The history of retributive principles in our penal law shows that we as a society do not advocate vengeful punishments. Retribution, in its most effective and accepted form, operates to reaffirm our values, not destroy them by gloating in the death of another. While many argue that the victim's family has a need for closure, such a benefit—although a legitimate governmental interest—cannot be extracted unless the punishment itself does not conflict with society's justifications for punishment. There are limits to what we, by virtue of our Constitution, allow our punishers to do; legitimate governmental interests, especially those designed around a private form of vengeance, are not a sound basis for meting out

B4 (calling the idea of closure a "cruel lie"); Prejean, *supra* note 168, at 1D (quoting a distinguished death penalty counselor for the victims' and prisoners' families who argues that viewing executions does not do much for victims' families); Ken Zapinski, *Victims' Families Find No Peace*, THE PLAIN DEALER, Nov. 29, 1994, at 6A (quoting a prosecutor who prosecuted Dahmer and conveyed the statement of one of the victim's parents when they learned of Dahmer's death: "It will never be over because we lost our son.").

Linda Kelly, the first to view an execution in Texas under the Parole Board's new policy, expressed her concern that the sense of closure was not real, and her and her family will experience more bouts of depression: "I'm trying to make myself realize that even when I'm back home and [the execution] is all over, [my children] are still gone and we still have to live with this." Hancock, *supra* note 167, at 1A. Michael Radelet, a Florida sociologist who has written four books on the death penalty, stated: "The families get used and co-opted. . . I don't even know what the term 'closure' means. Someone kills your child, there is no closure." Romano, *supra* note 6, at A1.

punishments. A victim's family viewing the prisoner's execution, whether authorized by statute, regulation, or the warden's judgment, violates the Eighth Amendment's prohibition on "cruel and unusual" punishments.

